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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

TRINITY TERM, 1842, TO EASTER TERM, 1843.

BY ALFRED DOWLING,

SERJEANT AT LAW,

AND VINCENT DOWLING, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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A

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119, marginal note, lines 19, 20 and 21, for "Accountant General of the Exchequer" read
"Attorney General."

119, marginal note, line 40, for "Accountant General" read "Attorney General."

120, line 1, for "Accountant General of the Exchequer" read "Attorney General."

629, reference (b), for "Ib. p. 290" read "4 Bing. N. C. 290."

716, line 8, for "complete" read "complex."

740, line 22, for "real" read "read."

740, line 35, for "contended" read "competent."

REPORTS OF CASES

DETERMINED ON

POINTS OF PRACTICE.

COURT OF QUEEN'S BENCH.

Trinity Term.

IN THE FIFTH YEAR OF THE REIGN OF VICTORIA.

Doe dem. DOLBY v. HITCHCOCK.

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V. *LEE* moved for judgment against the casual ejector. The facts of the case were, that the premises had been originally let to a person named Green, who demised them to a person named Hitchcock. Both Green and Hitchcock had become bankrupts. A person, named Henry Harmer, who, it was believed, was a messenger under the second commission, was on the premises. He, however, refused to state who he was, or in what character he was there. He had been served, and the affidavit of service stated, that the deponent had served the tenant in possession, by serving one Henry Harmer who was on the premises.

An affidavit of service of a declaration in ejectment must state positively and not inferentially, the service to have been effected on the tenant in possession.

WIGHTMAN, J.—That is not sufficient. In order to

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entitle you to sign judgment against the casual ejector, it must be sworn that a service has been effected "on the tenant in possession." Either there is a tenant in possession or there is not. If there is, a service on him must be sworn to. If there is not, then you must proceed as on a vacant possession. That is not done here.

Rule refused.

SANDFORD v. WYATT.

On an application to set aside a ca. sa., and subsequent proceedings to outlawry, on the ground that the writ had been made returnable immediately, in conformity with the provisions of the 3 & 4 Wm. 4, c. 67, s. 2, instead of making it returnable on a day certain with fifteen days between

JERVIS shewed cause against a rule nisi, obtained by Sir *John Bayley*, for setting aside a writ of *capias ad satisfaciendum*, and subsequent proceedings to outlawry, on the ground that the former had been made returnable immediately after its execution, in conformity with the provisions of the 3 & 4 Wm. 4, c. 67, s. 2, instead of being made returnable on a day certain, allowing fifteen days between the teste of the writ and its return. The constant practice had been since the passing of the above statute, to make writs of ca. sa., issued for the purpose of outlawry returnable immediately, and the words of the statute, which were general, supported such a practice. The case of *Kemp v.*

certain number of days, for the purpose of fixing the bail, but, in the present case, that was not necessary. Another objection was, that an unnecessary direction to the sheriff, to inform the Court of Exchequer what had been done on the writ, after it had been returned into the Queen's Bench, was introduced on the face of the writ of *ca. sa.* This was, however, mere surplusage. On both grounds, the present rule ought to be discharged.

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Sir *John Bayley* supported the rule, and contended, that the direction to inform the Court of Exchequer what had been done on the writ, was, in fact, making, a Queen's Bench writ returnable in another Court. The writ, consequently was a nullity. Then, with respect to the time of making the writ of *ca. sa.* returnable, it was clear that the 3 & 4 Wm. 4, c. 67, s. 2, did not apply to such a writ as the present, but merely to ordinary writs of execution, on which it was not intended to take the ulterior proceedings of outlawry. The case of *Kemp v. Hyslop*, was a direct authority in favour of this construction.

Cur. adv. vult.

WIGHTMAN, J.—This was an application to set aside a *ca. sa.*, and subsequent proceedings to outlawry, on the ground that the former was returnable immediately after the execution, but that it ought to have been returnable on a day certain, with fifteen days between the teste and the return. The case of *Kemp v. Hyslop* (a), was relied upon in support of the objection. That case was decided very much, if not entirely, upon the incompatibility of the rules in favour of bail, with a process returnable at any time for an indefinite period; and, in practice, I am informed, that it is very common to make writs of *ca. sa.*, issued with a view to outlawry, returnable immediately

(a) *Ante*, vol. 4, p. 687, O. S.; 1 M. & W. 58, S. C.

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after the execution, and without giving any opinion whether such a practice is regular or not; it appears to me inexpedient to determine such a question upon motion, and I, therefore, shall leave the defendant to his writ of error, and discharge the rule. There was a subordinate point of which the defendant may also avail himself, if there is anything in it.

Rule discharged.

TWIGHT v. PRESCOTT.

Where a declaration in assumpsit, stated that a warrant of attorney had been given to secure a sum payable in respect of a sale of a business, and that afterwards, in consideration of forbearance of legal proceedings, in respect of an alleged breach of stipulation regarding the

PEARSON shewed cause against a rule nisi, obtained by *White*, for setting aside a demurrer to a declaration, as frivolous. The declaration was in these terms, "For that whereas the defendant before the time of making the agreement and promise by him hereinafter mentioned, to wit, on the 22nd day of July, A.D. 1841, made and executed a certain warrant of attorney, sealed with his seal, and now shewn to the Court of our lady the Queen, before the Queen herself here, the date whereof is the date aforesaid, addressed to Abraham Crossfield and David Jennings, attorneys of her Majesty's Court of Exchequer of Pleas at Westminster, jointly and severally, or to any other at-

100*l.*, together with costs of suit, and all other incidental costs and charges attending the said judgment, execution, and otherwise. And which said warrant of attorney was and is subject to a certain defeazance, a memorandum in writing, containing the substance and effect whereof, was then, to wit, on the day and year aforesaid, made on the said warrant of attorney, in the words and to the effect following, (that is to say,) "Memorandum—The within warrant of attorney is given to secure the payment from the within named John Prescott, (meaning the defendant,) to the within named William Twight, (meaning the plaintiff,) of the sum of fifty pounds of lawful money of Great Britain in manner following, (that is to say,) the sum of eight pounds, part thereof, on the 22nd day of August, now next ensuing, and the further sums of eight pounds on the 23rd day of September next, the 22nd day of October next, and the 22nd day of November next, and the sums of nine pounds, further part thereof, on the 22nd day of December next, and the 22nd day of January, which will be in the year A.D. 1842, making in the whole, the said sum of fifty pounds: And it is hereby agreed, by and between the said parties, (meaning the plaintiff and the defendant,) that no judgment shall be entered up or any action, execution, or other process be commenced, issued out, or prosecuted against the said John Prescott, (meaning the defendant,) his heirs, executors, or administrators, or against his or their lands, tenements, goods, or chattels, until default shall happen to be made in any or either of the above mentioned instalments, on the days appointed for the payment thereof. But that upon such default being made, judgment may be entered up for the within mentioned sum of one hundred pounds, and costs and execution may issue for the sum of fifty pounds, or for so much thereof as shall be then due and unpaid, together with the costs of execution, levying sheriff's poundage, officers' fees, and all other incidental costs, charges, and expenses whatsoever: and it is also hereby agreed by and between the said parties,

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(meaning the plaintiff and the defendant,) that it shall not, in the event of the said Wm. Twight, (meaning the plaintiff,) delaying to issue out execution on the said judgment, until after a year and a day from the signing hereof, be necessary for the said William Twight, (meaning the plaintiff,) his heirs, executors, or administrators, to revive the said judgment by scire facias or otherwise, and that execution may issue without it, as witness, our (meaning the plaintiff's and the defendant's) hands, this 22nd day of July, 1841." And which defeazance was duly subscribed and signed by the plaintiff and the defendant respectively, as by the said warrant of attorney and defeazance respectively, (reference being thereunto had,) will more fully appear. And thereupon, afterwards, to wit, on the 28th day of October, in the year 1841, aforesaid, by a certain memorandum of agreement in writing, then, to wit, on the day and year last aforesaid made and entered into, by and between the plaintiff, therein described as agent for William Stockbridge, of 30, Great Quebec Street, New Road, Middlesex, and the defendant, reciting that the defendant on the 22nd day of July then last, to wit, on the 22nd day of July, in the year last aforesaid purchased of the said William Stockbridge, the goodwill and fixtures of a tobacconist's shop in the house, numbered 209, Whitecross

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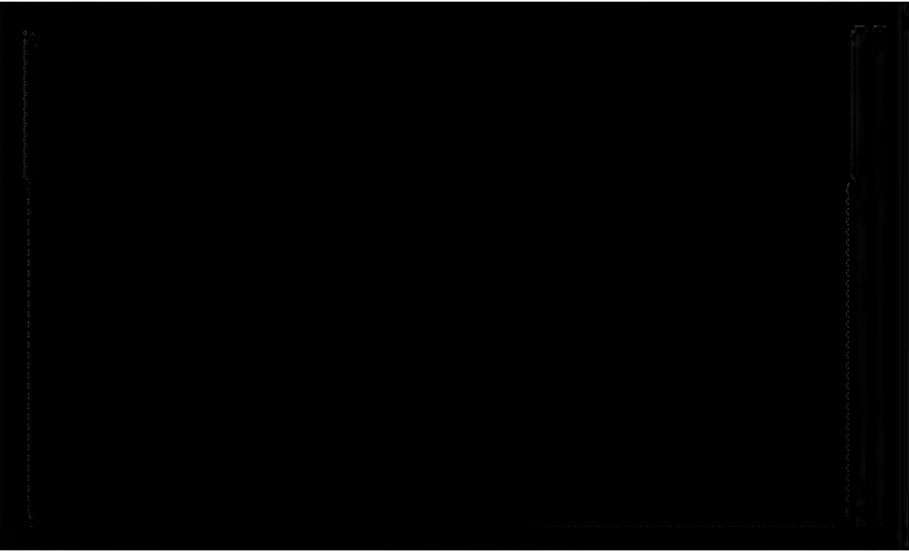
fact, says, that he, the said plaintiff, confiding in the said agreement and promise by the defendant, did, afterwards, to wit, on the day and year last aforesaid, credit, and hath some time credited, and still doth credit to the defendant, on the said warrant of attorney, the said sum of 22*l*. Yet the defendant, not regarding the said agreement, nor his said promise, so by him made as aforesaid, hath not, (although often requested so to do) as yet paid the said sums of 7*l*., which became due and payable from the defendant on the said 28th day of January, and on the said 28th day of April, in the year 1842 aforesaid, respectively mentioned in the said agreement, or any part thereof, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do." To this the defendant demurred specially, assigning for causes, "That the said plaintiff hath altogether, in his said declaration, failed to shew that he has any cause of action, or any legal ground to maintain the same against the defendant, in the form adopted in his said declaration, but hath, on the contrary thereof, and by the averments and allegations set forth in the said declaration, clearly shewn that the present action of assumpsit is not a remedy which the said plaintiff can, in accordance with the strict rules of pleading, pursue for the recovery of his said demand; for that the plaintiff, in so declaring, shews that a liability

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This was an authority to shew, that the plaintiff was bound to bring covenant, and not assumpsit, although there was a subsequent recognition of the plaintiff's claim in the arrangement, which afterwards took place with respect to the sum due. In the case of *Gwynne v. Davy (a)*, the plaintiff declared in assumpsit, and the declaration recited a deed under seal, which had been entered into, for the performance of certain stipulated operations in chemistry, by the 21st of June, 1838, and which might be determined by the defendants, upon notice given, in case of the non-fulfilment of the contract by that time, and alleged a subsequent parol agreement between the parties, extending the time for completing the contract, to the 21st of December, 1838, but it contained no statement of the determination of the deed. The Court of Common Pleas there held upon demurrer, that the action was wrongly conceived in assumpsit upon the parol agreement, and that covenant should have been brought upon the original deed.

White, contra was stopped by the Court.

COLERIDGE, J.—I do not think that case applies to the present. Suppose the payment of rent was reserved by a lease payable on a particular day. When it becomes due,



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that the late copartnership firm, theretofore carrying on the business of coal merchants at the Adelphi wharf, in the county of Middlesex, consisting of Charles Henry Papps, James Thomas Bottomley, John Henry Hensman, and Frederick Hensman, did, in the month of March then last, apply to and request, and subsequently to its dissolution, which took place on the 25th day of the said month, the present copartnership firm consisting of the said James Thomas Bottomley, John Henry Hensman, and Frederick Hensman, carrying on the same business at the same place, had applied to, and requested the defendant to become surety or guarantee for such firms respectively, to their respective bankers and other persons for the payment of any claim which the said bankers or any other persons then or thereafter might have against them, the said Charles Henry Papps, James Thomas Bottomley, John Henry Hensman, and Frederick Hensman, or the said James Thomas Bottomley, John Henry Hensman, and Frederick Hensman, respectively in any transactions, and in order to induce the defendant to give and enter into the said writing obligatory in the sum above mentioned for indemnifying the defendant against any such guarantees, which he had given and entered into for either of the said copartnership firms, or which he should thereafter give or enter into for

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and at the request of the said copartnership firm to Thomas Godfrey Sambrooke, whereby the defendant duly guaranteed the said Thomas Godfrey Sambrooke the payment of coals, to be supplied to the same copartnership firm to the extent of 500*l*. And after making the said writing obligatory, and before the commencement of this suit, to wit, on the 3rd day of April, A. D. 1835, the defendant, relying on the said obligation, gave and entered into another guarantee for and at the request of the same copartnership firm to the said bankers in the said condition mentioned, to wit, certain persons carrying on the trade and business of bankers under the name of Rogers, Olding, Sharpe, Boycott, and Company, whereby the defendant duly guaranteed to the said bankers the payment by the same copartnership firm of a certain sum of money, to wit, 1000*l*. Nevertheless the defendant saith that the plaintiff, Caroline, whilst she was sole and unmarried, and the plaintiffs, since their intermarriage, did not nor would save harmless, or keep indemnified the defendant from and against all sums of money, loss, costs, charges, damages, and expenses, actions, suits, claims, and demands by reason, and on account of the said guarantee, entered into after making the said writing obligatory, as aforesaid, but wholly neglected and refused so to do, by means, and in consequence thereof, the defendant, after making the said writing obligatory, and

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the money in order to set it off, but that on production of the bond, the plaintiff was bound to prove payment. There, Lord *Tenterden* said,—“this question arising on a plea of set-off, must be treated as if it had arisen in an action on the bond. Now that was conditioned for payment of the annuity as well as for indemnifying the defendant; and had an action been brought on this bond the obligor would, as in the ordinary case of actions on bond, have been bound to prove payment.” In that case, it was assumed throughout, that the plea would be good, whether the bond was for indemnity in respect of a money claim or not. In 2 *Chitty's Statutes*, p. 875, title “Set-Off,” it was laid down “with respect to the nature of the demands to be set-off against each other, the statute only speaks of mutual debts, and therefore the only actions in which a set-off is allowed, assumpsit, debt, and covenant, for non-payment of money; and on the other hand, the subject matter of set-off must be a debt, and a bond, in a penalty conditioned for payment of an annuity; or for payment of stipulated damages may be set-off; so when there has been a sale of goods under an entire contract, and the defendant has delivered a part, which the plaintiff accepted and had the benefit thereof, the value of the part delivered may be set-off, although he is liable to an action for the neglect to deliver the entire quantity.” The ques-

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could not have been referred to the Master, but that breaches of the condition must have been suggested. In the notes to *Gainsford v. Griffith* (a), it was said, "the next consideration is, where there is judgment for the plaintiff, either upon demurrer, or by default. In each case, the plaintiff must suggest upon the roll breaches upon the covenants, he seeks satisfaction for." That shewed, that the obligor must, in such a case, suggest breaches. It would, therefore, be error, if the case was referred to the Master, without executing a writ of inquiry, upon breaches suggested pursuant to the statute.

WIGHTMAN, J.—There is no doubt that this bond would be within the statute of William, if so, there would be great difficulty imposed upon the plaintiff by this mode of pleading. The jury must assess the damages which had been caused to the defendant, and which may be more or less than the sum mentioned in the penalty. It may be 5*l.* or 500*l.* You cannot set-off a penalty.

Rule discharged.

(a) 1 Wms. Saund. 58, c.

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Doe dem.

CLARKE

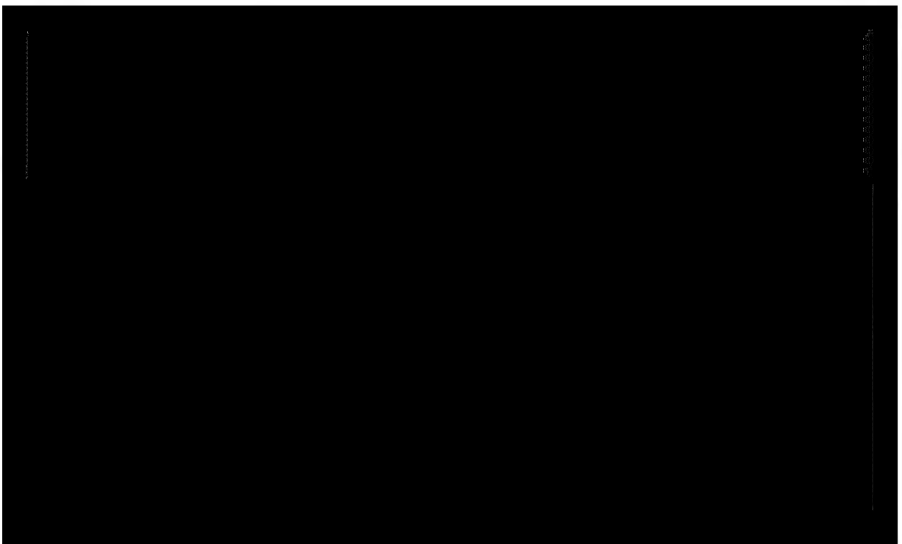
v.

STILLWELL.

was a mere civil proceeding; this was an attachment for not surrendering an estate, which it did not yet appear to the Court that the defendant was capable of surrendering; it was precisely the case, in which the party was entitled, to exhibit interrogatories, and if so, she was entitled to be admitted to bail, until the prosecutor chose to call her before the examiner. The practice at present existing, was certainly in favour of this application.

WIGHTMAN, J., (after conferring with the Master of the Crown Office).—The award might order her to do something which had become impossible for her to do. If she was not allowed to show that fact on interrogatories, she must remain in custody for ever. The practice is in conformity with the present application. I don't discharge the defendant absolutely out of custody, but I do so, on giving bail. She may, therefore, be discharged, on giving bail, her own recognizance in 100% and two sureties, in 50% each. This rule will be absolute on those terms.

Rule absolute accordingly.



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at the last Worcester Assizes, and although the claim of the plaintiff was 26*l.* 1*s.* 6*d.*, the jury only returned a verdict for a sum of 3*l.* 1*s.* 6*d.* The defendant, it appeared, was resident in the town of Birmingham, and within the jurisdiction of the commissioners appointed under the two acts already mentioned. By the former of those acts, a power was given to the commissioners to try certain causes of action amounting to forty shillings. The jurisdiction of the commissioners was afterwards extended by the 47 Geo. 3, c. 14, s. 2, to causes of action amounting to 5*l.* The cases to which their jurisdiction extended, were claims for any sum not exceeding 5*l.*, in all cases or causes of debt, whether such debt shall arise on any promissory note or inland bill of exchange, or for rent upon leases, articles, minutes, and in all causes of assumpsit and insimul computasset, and in all causes or actions of trover and conversion, and in all causes and returns founded on a quantum meruit, and in all causes or actions of trespass, or detinue for goods and chattels taken or determined. Then by section 17, it was provided, that "if any action or suit shall be commenced in any other Court than the said Court of Requests, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of the said recited act, and of this act, or either of them in the said Court of Requests, then and in every such case, the plaintiff or plaintiffs in such action or suit shall not, by

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Blackheath Court of Requests' Act, *Tindal*, C. J., said, "the only reliance of the plaintiff is on the argument that we are to interpret the words *sought to be recovered* in the last act, as meaning whatever the plaintiff thinks he may recover. But from the context it is plain the Legislature must have meant the sum which the plaintiff actually recovers; otherwise, a plaintiff might always elude the act, by putting in his declaration more than he knew to be due." *Vaughan*, J., also said, "upon any other construction, we should have to decide in every case, a question of reasonable and probable cause." These cases clearly shewed that the Court would only look to the amount for which the jury found their verdict. It was here less than 5*l.*, and, therefore, the plaintiff was not entitled, in consequence, to his costs. The present rule, ought, therefore, to be made absolute.

WIGHTMAN, J.—The sum for which a plaintiff brings his action is immaterial, for the Court cannot look beyond the verdict, as that determines the sum which the plaintiff is entitled to recover. The cases establish that to be the principle on which questions of this description ought to be decided. It is a matter of fact for the jury to determine whether the plaintiff was entitled to a sum beyond that to which the jurisdiction applied. The present rule, must,

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DAVY.

compel the justices to interfere in the way proposed? It was admitted that no instance had been found of the Court granting such a rule, or of magistrates actually proceeding as desired; and it might certainly be urged that the remedy by indictment was still open to the party.

WIGHTMAN, J.—I don't think I can compel the magistrates to proceed as required. You have no instance in which such an interference of magistrates appears to have taken place.

Rule refused.

Doe dem. BLACKBURN v. STANDISH.

Where several successive ejectments have been brought to recover certain property, but none of them have been tried, the Court will not stay proceedings in a subsequent ejectment, until the costs of the

ERLE and **JOHNSON** shewed cause against a rule obtained by *Cowling*, calling on the lessor of the plaintiff to shew cause why the proceedings in this case should not be stayed, until the costs of certain previous actions of ejectment brought in respect of the same property, and on the same title were paid. It appeared from the affidavits that in the year 1812, Sir Frank Standish died seised of the estate in question; to him succeeded as heir at law, Sir Frank Hall Standish, and he died seised in 1840, and was succeeded

of the same property, by the same lessor of the plaintiff, but they were discontinued, without the defendant appearing. The lessor of the plaintiff then became insolvent, and subsequently, in the year 1832, another action of ejectment was brought for the recovery of the same property, by the insolvent and his assignee. A rule was then obtained to stay proceedings in that action, until the costs of the previous actions were paid; that rule was made absolute, but the costs were never paid. In 1841, the present action was commenced, on the demise of the son of the lessor in the former actions, and of an assignee of the late insolvent, who had been substituted for the former assignee, he having died. The defendant appeared to the action, and issue was joined on the 4th of August, 1841. On the 9th of November following, an application was made by the lessors of the plaintiff for a commission to examine witnesses at Chorley, in Lancashire. The commission was executed at that place, and considerable expense incurred. The defendant, by his legal advisers, attended the execution of that commission. In the following December, the defendant requested the lessors of the plaintiff to allow the cause to stand over to the next Summer Assizes; no notice of trial had been yet given. Then in Easter Term, the present rule was obtained. It was submitted, first, that the application was too late, after the delay of which the defendant had been guilty in deferring his application. Besides, he had joined in the commission to examine the witnesses at Chorley, and had requested that the trial of the cause should be postponed until the next Summer Assizes. Unless that postponement had been made, the cause would have been tried at the last Spring Assizes. Again, in all cases, where applications of this sort had been allowed, it appeared not only that the same title was sought to be litigated, but the same parties, or one of them, were concerned in the cause, wherein it was sought to stay proceedings. Here, however, the parties were entirely different


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on both sides. Again, it must appear that the defendant applying for the rule was entitled to receive the costs incurred in the previous actions. Here, however, the defendant could have no right to receive them. He claimed, as heir-at-law, the costs however, were not paid out of the real estate, but out of the personal estate of the late Sir Frank Hall Standish. *His* executors, therefore, were the persons entitled to these costs, and not the defendant. Where the defendant applied for such a rule as the present he must shew that he was damnified by the payment of costs in the former actions. Here, however, that could not be shewn, as the costs had never been paid by him, or out of his estate. For these reasons, therefore, it was submitted that the present rule ought to be discharged.

Cowling, in support of the rule, contended that the fact of the parties in this action not being the same as those in the former actions, was no ground for discharging the present rule. In almost all the cases, in which the Court had interfered in the manner here prayed, the parties applying were different from those in the former actions. In *Doe dem. Feldon v. Roe (a)*, proceedings in ejectment were stayed till the costs of a former ejectment, brought by the father of the lessor of the plaintiff, against the defendant's father, on the same title were paid. There, it was clear, that



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well to a case where the second ejectment is brought by the assignee of an insolvent debtor, the first, having been brought by the insolvent, as to a case where the second ejectment is brought by the same party as the first. The proceedings, therefore, on the second ejectment must be stayed, until the costs of the first are paid." There, the objection now taken was expressly overruled. Then as to the point, that it did not appear that the applicant had any interest in the costs which the rule required the lessor of the plaintiff to pay. In *Doe dem. Mudd v. Roe (a)*, where an action of ejectment was brought to recover certain property, in which the defendant succeeded, the Court stayed the proceedings in a second action, brought by the devisee of the lessor of the plaintiff, against the devisee of the defendant on the same title, until the costs of the former action were paid. In that case, it was evident, that the party making the application, had no interest whatever in the costs. As to an objection on the ground of laches, that could not apply to such an application as the present, which was not like a motion to set aside proceedings for irregularity, or for security for costs. It was true, that issue had been joined time enough to proceed to trial at the last Spring Assizes, but no notice of trial was given. Until certain proceedings in equity were at an end, the defendant could take no step for the purpose of staying proceedings in the

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one, we cannot deny it him absolutely; but as it is a creature of the Court, and an equitable proceeding, we grant it him upon paying the costs, and making the recompense for the vexation he had caused in the prior ejectment." In *Keene v. Angel and Another (a)*, there was another defendant in the second ejectment, but the Court stayed proceedings till costs of former ejectments were paid, observing that the only question was, whether the title was the same, and that the change of defendants made no difference, as there would be a change of tenants in many cases, and if it was otherwise, it would be easy to evade the rule. *Doe dem. Feldon v. Roe (b)*. In the latter case, as well as in the case in 7 *Mod.* the merits had been tried upon the first ejectment, and it does not appear but that the merits may have been in question, in the case in 6 *T. R.* And where that has been the case, the reason derived from the peculiarities of the action of ejectment, would apply to where the defendant might, but for these peculiarities have pleaded a judgment obtained by himself, or those through whom he claims in bar as an estoppel, or where, if not so pleaded, the judgment would have been evidence all but conclusive to a jury. In such a case, I should have been disposed to stay the proceedings until the costs were paid, though the defendant was different, and had no interest in the former costs, as the subsequent pro-

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The only question left pending in equity was with respect to the costs of the proceeding. After the withdrawal of the sheriff, a writ of *capias ad satisfaciendum* was issued against the defendant, and an application afterwards made to set aside that writ, on the ground that the writ of *fi. fa.* had not been returned. The application was heard before Mr. Justice *Patteson*, and he was of opinion, although it was sworn that nothing had been realized under the *fi. fa.*, that the writ of *capias ad satisfaciendum* was irregular, the writ of *fi. fa.* not having been returned. A writ of attachment was then issued against the sheriff for not returning the writ of *fi. fa.*, although he was ruled so to do, and the present application made to set aside that attachment, on the ground that as the *fi. fa.* had been issued to a former sheriff, the present sheriff was not bound to return it, and consequently, that the attachment was irregular. It appeared that, at the time when the *fi. fa.* issued, a Mr. Painter was the sheriff; he was succeeded by a Mr. Lock; he was succeeded by a Mr. Bower, and this last, by Mr. Barclay, the present sheriff. It was submitted, however, that as by the law at present in force, the sheriff was bound to transfer all writs in his possession to the succeeding sheriff, it must be presumed, that the writ of *fi. fa.* in the present case, had been transferred to the succeeding sheriff. At common law, when a writ was issued to a

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he, she, or they shall sustain, by such neglect or refusal." The presumption, therefore, being that the writ had been transferred to the incoming sheriff, the plaintiff was justified in ruling the present sheriff to return the writ, and in attaching him, as he did not return it. In support of this rule, it was sworn, that the writ had not been handed over to the present sheriff, but that was not a ground of setting aside the attachment, as the plaintiff had no means of knowing that fact; and the plaintiff had a right to act, on the presumption that the preceding sheriffs had done their duty.

W. H. Watson supported the rule, and contended, that this was a mere attempt to punish the present sheriff for the default of a previous sheriff. It being positively sworn, however, that the writ of fieri facias had not been handed over by the previous to the present sheriff, there was no ground for attaching him. He cited *Green v. Elgie (a)*.

WIGHTMAN, J.—I think it is an answer to the attachment, that the writ never came to the sheriff's hands. If it never was turned over to him, he cannot be in contempt for not returning it. The present rule must, therefore, be absolute, and with costs.

Rule absolute, with costs.

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said Thomas Mayne hath no more goods or chattels, in my bailiwick whereof I can cause to be made the residue of the said debt, damages, and interest, or any part thereof, as within I am commanded." The objection to the return was, that the sheriff was not entitled to retain in his hands any further allowance, in respect of the execution than poundage. By the stat. of 7 Wm. 4, and 1 Vict. c. 55, s. 2, it was provided, that "it shall be lawful for sheriffs, or their officers concerned in the execution of process, directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several Courts of law, at Westminster, charged with the duty of taxing costs in such Courts, under the sanction and authority of the Judges of the said Courts respectively." Since that section came into operation, a scale of fees, to which the sheriff was entitled, had been jointly made by the Masters of the different Courts. To them, under the authority of the act, the sheriff was entitled, and if the scale was examined, it would be found, that the particular expenses here set forth in the return were authorized by that scale. In *Davies v. Griffiths (a)*, it was held, that the sheriff's right to poundage is not affected by the 7 Wm. 4, and 1 Vict. c. 55, or the table of fees made under it. That case was a direct recognition on the part of the Court, that the sheriff had a right, under the new statute, to the ex-

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the judgment was not on a cognovit or warrant of attorney, and there was no specific direction on the writ for the sheriff to levy anything besides the debt but his poundage, the statute of Victoria did not operate to give him a right to new fees. If it did, it would, in effect, operate as a partial repeal of the statute of Elizabeth, which the Court of Exchequer had said it did not. That the sheriff was not entitled to take the fees in question previous to the passing of the statute of Victoria was perfectly clear; in *Buckle v. Bewes* (a), it was held that the sheriff having taken goods in execution under a fi. fa., the proceeds of which were not sufficient to satisfy the plaintiff's claim, he could not, against the plaintiff, retain anything beyond the poundage allowed by the 29 Eliz. c. 4. Again, in *Foster v. Blakelock* (b), Lord Tenterden recognised the same principle, and in *Woodgate v. Knatchbull* (c), it was held that if it appeared by the sheriff's return to a writ of execution that greater fees had been taken for the levy than are allowed by the 29 Eliz. c. 4, the sheriff is liable to an action on the statute for treble damages, at the suit of the party grieved; and, under that statute, the sheriff cannot take any other charge except for the poundage. The case of *Longdill v. Jones* (d) was to the same effect. The provisions of the statute of Victoria did not interfere with the previously existing law, as it stood under the statute of Elizabeth, and, therefore, the

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the said sum of 67*l.* 11*s.* 6*d.* in the last count mentioned to have been found to be due to the plaintiffs on an account stated, is the same sum of 67*l.* 11*s.* 6*d.*, in the first count mentioned, and therein alleged to be due to the plaintiffs, for goods sold and delivered by the plaintiffs to the defendant, and that the said two sums of 67*l.* 11*s.* 6*d.* each, are one and the same debt of 67*l.* 11*s.* 6*d.*, and not other, and different debts of 67*l.* 11*s.* 6*d.* And the defendant in fact says, that the said goods so alleged to have been sold and delivered to the defendant as aforesaid, were certain large quantities of tobacco, before then sold and delivered by the said plaintiffs to the defendant. And the defendant further says, that before the time of the said sale and delivery to him, the said defendant, of the said tobacco, the said tobacco had been smuggled and imported into this kingdom from parts beyond the seas, without any of the duty then payable to our Lady the Queen on the importation thereof having been paid thereon, of which the plaintiffs before and at the time of the said sale and delivery by them to the defendant of the tobacco aforesaid had notice. And the defendant in fact further saith, that the plaintiffs offered for sale, and sold and delivered to him, the said defendant, the said tobacco, so being smuggled, and imported into this kingdom as aforesaid, they the said plaintiffs at the time of such sale and delivery as aforesaid, not being

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was, that if the quantity of tobacco to be removed, on any occasion, was more than 10lbs. in weight, a permit was necessary for that purpose; but if the quantity to be removed was less than 10 lbs., a permit was unnecessary. What the plaintiff should have traversed was, whether a permit had been obtained on removing the tobacco. This, however, was not traversed by the replication, but other matters, immaterial, were traversed. Secondly, the replication traversed too much, for it not only traversed the non-existence of the license, but the fact of the smuggling. The fact of the smuggling was immaterial, as a party may, under certain circumstances, make a legal sale of a commodity, although he may know that it has been smuggled, as in the case of a Custom-house sale. The only part which could be considered as material, was as to the license, but the plaintiff had no right to place the defendant in a difficulty, by traversing several matters in his replication. In *Regil v. Green* (a), Parke, B., said, in a similar case, "I think the defendant is right, this is not precisely duplicity, but the plaintiff has no right to include several matters in his replication, so as to embarrass the trial." Thirdly, the traverse in the replication was wrong in point of form. The plea set forth matters in excuse; and in *Griffin v. Yates* (b), the Court of Common Pleas held, that *de injuriâ* is a

proper replication in assumpsit where the plea consists of

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the factor, and that the defendant did not know that the goods were not the property of the factor; and that, at the time of their sale and delivery, the factor was indebted, and still is indebted to the defendant in more than the value of the goods, and that the defendant was ready and willing to set-off and allow to the plaintiff, the value of the goods, out of the money so due and owing from the factor. The Court held, on special demurrer, that the plea was good. Under these circumstances, it was submitted, that on all the grounds, the replication was good.

Crompton replied.

Cur. adv. vult.

WIGHTMAN, J.—In this case a question arose as to the validity of a replication. It was objected, first, that the replication should have traversed the delivery without a permit, but in order to make that material, it should have appeared upon the plea that a permit was necessary. The statutes prohibiting the removal of certain exciseable commodities, including those in question, were referred to in the argument, and it appeared from them, (1 & 2 Geo. 4, c. 109, ss. 1 & 2; 6 Geo. 4, c. 81, s. 26; 2 Wm. 4, c. 16, s. 12; 3 & 4 Wm. 4, c. 53, s. 29,) that no permit was necessary upon the removal of tobacco, unless the quantity

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is at liberty to deny several facts stated in a plea, may not select some, and traverse them, or that his replication would be demurrable, because not in the form of *de injuriâ*, and in the absence of such authority, I think there should be judgment for the plaintiff upon this demurrer.

Judgment for the Plaintiff.

SMITH, Administratrix of SMITH, v. CLINCH.

Where a Judge's order has been made for paying a certain sum of money out of Court, to a claimant under an interpleader rule, the Court will not refuse to enforce that order, because there is a creditor's suit pending in equity, against the claimant, and an injunction granted, which has not been served on the officers of

LUDLOW, Serjt., shewed cause against a rule nisi, obtained by *Whateley*, calling on the defendant in this case, to shew cause why the sum of 175*l.* paid into Court by the sheriff of the county of Oxford, in a cause of *Clinch v. Smith*, under an order of Mr. Justice *Coleridge*, dated the 13th day of February, 1840, should not be paid out of Court, to Ann Smith, the plaintiff, in this cause, or to her attorney. This was an action of trespass brought to try the right of property in certain goods seized by the sheriff in the last mentioned action, pursuant to an order made by Mr. Justice *Coleridge*, on an interpleader rule. It appeared that when the writ of *fi. fa.* issued against the goods of the defendant in the last mentioned action, and was executed,

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defendant. I cannot recognise the rights of the receiver, as no injunction has been served upon the officers of the Court. The present rule must, therefore, be absolute.

Rule absolute.

BENNETT v. GARDENER.

On making a rule absolute for setting aside proceedings in outlawry, pursuant to the usual application on payment of costs, the Court will not limit the period within which those costs shall be paid.

BITTLESTON shewed cause against a rule nisi, obtained by *Rawlinson*, for setting aside an outlawry, on the ground that the defendant was abroad at the time when the exigent was awarded. It was admitted that the application could not be resisted, it being made in the ordinary way on payment of costs. It was submitted, however, that some period should be limited, within which the costs should be paid. Otherwise the payment of those costs might be indefinitely postponed.

Rawlinson, in support of the rule, contended that as this was the ordinary application to set aside the outlawry, on payment of costs, there was no ground for imposing the term as to the period within which the costs should be paid. No advantage could be taken of this application, until the costs were paid, nor did this application operate

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Doe dem. VORLEY v. ROE.

Where the notice at the foot of a declaration in ejectment is addressed to all the tenants in possession of distinct parts of the premises, and each tenant is served with a copy addressed to all, there should be only one rule for judgment.

BYLES shewed cause against a rule nisi, obtained by *Humfrey*, for setting aside certain rules for judgment against the casual ejector. It appeared that there were eight several tenants of the property, which was sought to be recovered, each occupying a distinct portion, and eight declarations were served, each being directed to all the tenants. Eight affidavits of service having been effected, as well as eight motions for judgment against the casual ejector were made. It was submitted, that in pursuing this course, the lessor of the plaintiff had been perfectly regular. If any one of the proceedings was considered, it would appear that it was perfectly regular. If each particular one was regular, it was impossible to say that all of them were not regular. In 2 *Tidd's Practice*, p. 216, 9th ed. It was laid down that, "when the declaration has been served on several tenants in possession of different parts of the premises, there should be one or more affidavits, stating the service on each of them. If they were all served by one person, on the same day, a single affidavit of service is sufficient, stating generally that he personally served A. B. C. D., &c. tenants in possession, &c.; but otherwise there should be several affi-

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Ex parte HANCOCK.

Where an articulated clerk has served a portion of his time with a particular master, who has gone abroad, and who cannot execute an assignment of the articles, the Court will allow him to serve the remainder of his time with another master, without an assignment of the articles; even where the assignee of the articles is not named at the time of the application.

HUMFREY moved on behalf of a person named Hancock, an articulated clerk, that he might be allowed to serve the remainder of his time with a person named Young, without an assignment of the original articles, under which he had been bound to a person named Body. It appeared, by the applicant's affidavit, that he had been originally articulated to a person named Body, and that he, after the clerk had served two years, disposed of his business to a person named Young, and went abroad. On leaving the country, he left a power of attorney with his brother, to execute all assignments, and do all other acts on his behalf. That, perhaps, would not be sufficient to entitle him to execute an assignment of the articles to Young. An assignment could not be procured from Body himself, although Young was willing that Hancock should serve the remainder of his time with him. The object of the present application was, that the assignment from Body might be dispensed with.

WIGHTMAN, J.—I think that may be done under the particular circumstances of the case.

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E. V. Williams, in support of the rule, contended that the objection taken by the assignees rendered the warrant a mere nullity, as by the words of the section in question the warrant of attorney was not "to be of any force," unless the provisions contained in the statute were complied with. The delay which had occurred did not affect the validity of the objection, as a nullity could not be waived, *Garratt v. Hooper* (a), *Roberts v. Spurr* (b). Then, as to the objection itself, the affidavits clearly shewed that the attorney acting for the defendant was the attorney acting for the plaintiff. This had been decided in a variety of cases to render the warrant invalid. He cited *Mason v. Kiddle* (c), *Sanderson v. Westley and another* (d), *Rising v. Dolphin* (e), *Durrant v. Blurton* (f), as express authorities in support of that proposition. On these grounds, it was submitted, that the present rule ought to be made absolute.

Cur. adv. vult.

COLERIDGE, J.—The question before me in this case was, whether the attorney attesting the defendant's execution of a warrant of attorney, was in such a relation to him at the time, as satisfied the requisitions of the 1 & 2 Vict. c. 110, s. 9. There could be no doubt upon the affidavits, that he had been for some years before, and also since, his usual legal adviser; he was, in some sense at least, present

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 }
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both parties, and the consequence is, that the statute has not been complied with. The magnitude of the sum, and the total absence of any imputation of fraud, naturally make one regret the consequence; but this is a case of construction, and if the rule of construction were to be relaxed upon those considerations, a precedent would be established, that must be applied equally to a case of fraud. It is only by holding the rule at once strict and inflexible, that the possibility of fraud can be prevented. It was faintly argued that the statute did not make the warrant absolutely void, by reason of an imperfect attestation, and that, in the present case, the application, though made by assignees to set aside the proceedings, came too late; the words, however, are, that it shall not "be of any force." If I treat this defect as a mere irregularity, and allow it to be waived by delay, the warrant must then be of force to sustain the judgment. If, giving the words their natural meaning, I make it void, the judgment then has nothing on which to rest. It is as if entered up by an unauthorized stranger, and time cannot render such a judgment of any greater effect than it was when first signed. The rule, therefore, must be absolute.

Rule absolute (a).

(a) See *Hulson v. Hulson*, 7 T. R. 7; *Todd v. Gompertz*, ante, vol. 6, p. 206, Q. 8.

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The second is the 43 Eliz. c. 2; by the 7th section of which it is enacted, that poor persons shall be relieved by their parents or children according to the rate assessed by the justices of the peace, upon pain of forfeiting 20s. for every month they fail therein. "Children" in this section means legitimate children only, *The City of Westminster v. Gerrard*. (a) It is to be observed that the 43 Eliz. c. 2, not only provides for the maintenance and support of legitimate children, but also punishes the desertion and neglect of such children. These subsequently became the objects of separate enactments. By the 7 Jac. 1, c. 4, s. 8; the 17 Geo. 2, c. 5, s. 2, and the 32 Geo. 3, c. 45, s. 8, other penalties were substituted for that imposed by the 43 Eliz. c. 2, s. 7, and desertion and neglect of a family having, by these statutes, been made acts of vagrancy, fell under a distinct branch of the law. The above statutes were consolidated by the 3 Geo. 4, c. 40, which was itself repealed by the 5 Geo. 4, c. 83. This statute, therefore, as regards the poor, governs that class of offences, and that only, which was created by the 43 Eliz. c. 2, s. 7. The 4 & 5 Wm. 4, c. 76, adopts the usual construction; in sections 56 and 78, "child or children" cannot include bastards, and in section 57, words are specially introduced to make the term comprise illegitimate children. The 5 Geo. 4 c. 83 is a highly penal act. The words are

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WIGHTMAN, J.—In the course of the term cause was shewn against a rule for a mandamus to Daniel Maude, Esq., one of the justices of the borough of Manchester, for the purpose of convicting a single woman under the 5 Geo. 4, c. 83, for running away and leaving her bastard child chargeable to the parish; and the question was, whether a bastard was included under the word “child” in the act of Parliament? By the 4th section of the act, certain persons are to be deemed rogues and vagabonds, and amongst them “every person running away and leaving his wife and his or her *child* or *children* chargeable to the parish,” and it was considered, in support of the rule, that though in cases of tenure the word “child” is to be understood a legitimate child, it is not so, where the object of the law is to punish or disable. It was submitted, that the question was raised now for the first time, and that it had hitherto been considered that the penalties of the act applied to the desertion of legitimate and not of illegitimate children. But the 5 Geo. 4, c. 83, is not the first statute in which the same, or nearly the same words are used in describing a class of persons who are to be deemed rogues and vagabonds. By the 3 Geo. 4, c. 40, s. 3, “all persons who run away and leave their wives or children chargeable to the parish” are to be so deemed; and by the 17 Geo. 2, c. 5, s. 2, “all persons who run away and leave

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WEEDON v. GARCIA.

Where judgment was irregularly signed, and execution levied on the 9th of March, it was held too late to apply to set aside the judgment on the 28th of April following, either at the instance of the defendant himself, or of his assignees, he having subsequently become bankrupt, although the latter were not aware, until the 7th of April, of the irregularity existing in the judgment.

THESIGER shewed cause against a rule nisi, obtained by *Humfrey*, calling on the plaintiff to shew cause why the judgment in this case, and execution thereon, should not be set aside, on the ground that the judgment had been signed a day too soon, it having been signed on the 9th of March instead of the 10th. The facts and dates, as they appeared in the affidavits, were these. It was an action of debt on two bills of exchange. The defendant not having appeared, the plaintiff duly entered an appearance according to the statute. The plaintiff afterwards declared and signed judgment on the 9th of March, for want of a plea, and a writ of fieri facias was issued on the same day, and delivered to the sheriff, who executed it either on that or the following day. The sheriff remained in possession until the 22nd of the same month, and a bill of sale was then executed to a person named Townsend. He having paid the amount of the sale, possession was given to him, and the purchase money remitted to the plaintiff. On the day of executing the bill, a fiat was issued, and on the 29th it was opened. Assignees were appointed on the 7th of April. On the 14th of the same month, they ruled the sheriff to return the writ. An examination of the parties


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was, and in consequence of their delay, considerable injury had been wrought to the plaintiff. This observation was supported by the opinion of the Court in *Routledge v. Giles*. There Lord *Lyndhurst* said, "if you had applied earlier at Chambers, the plaintiff might have abandoned his execution and retaxed his costs, in time to avoid the effect of the bankruptcy. You must come promptly to complain of an irregularity. In consequence of your delay, if this judgment was set aside, the plaintiff would sustain serious injury." Those observations apply to the present case. If the defendant in the action had applied within a reasonable time after the 9th of March, when the execution was levied, the plaintiff might have had an opportunity of signing another judgment, and suing out a fresh writ of execution. He could then have secured to himself the advantage which his judgment and execution would give him, notwithstanding the bankruptcy, but of which, if the judgment is now allowed to be set aside, he would be deprived. Under these circumstances it was submitted, that the present rule ought to be discharged.

Humfrey, in support of the rule, contended that the cases cited on the other side were distinguishable from the present; as here, the affidavits disclosed that the judgment had been signed, and the execution issued by



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ment on the 9th of March, a day too soon. The only question raised was, whether the application was in time, and it was contended to be so, because made by the assignees of the defendant, now a bankrupt, and because the judgment was signed by collusion between the plaintiff and defendant. The affidavits do not satisfy me that there was any collusion, and as the ground of the motion is limited to irregularity, the collusion would be, if made out, immaterial. The facts and dates are these: the action was in debt on two bills of exchange. Appearance was entered for the defendant according to the statute. Judgment was signed, and the writ issued and delivered on the 9th of March; which was executed on that or the following day, and the sheriff remained in possession till the 22nd, when a bill of sale was executed to one Townsend, who paid the money, which was handed over to the plaintiff. Townsend then received and retained possession. On the same 22nd, the fiat issued, and was opened on the 29th; the assignees were appointed on the 7th of April. On the 14th, they ruled the sheriff to return the writ. On the 26th, by examination of the parties, they ascertained the irregularity, and made this application on the 28th. As the goods were seized on the bankrupt's premises, he must be taken to have known of the judgment and seizure on the 9th or 10th of March at latest, and he must be taken also accord-

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acceptor of a bill of exchange for 66*l.* 15*s.*, at four months' date. The declaration proceeded, "and the defendant then accepted the said bill payable at Messrs. Cunliffe and Co., bankers, London, and the said William Harland (the drawer) then indorsed the same to the plaintiff, and the defendant then promised the plaintiff to pay her the said bill according to the tenor and effect thereof, and of the said acceptance and indorsement." The demurrer to this declaration was, "for that although it appears that the said bill of exchange was specially accepted by the defendant, and by him made payable at Messrs. Cunliffe and Co., bankers, London, yet it is not averred, nor does it appear from the said first count that the said bill of exchange was ever presented at the said Messrs. Cunliffe and Co's. for payment according to the terms of the said acceptance; and also that it is not averred that the defendant had notice of the indorsement of the said bill of exchange, which notice was necessary in order to make the defendant liable to the indorser, and the averment of which is required by the general rule of all the Courts promulgated in Trinity Term in the first year of the reign of his late Majesty King William the Fourth." It was submitted that this demurrer was not frivolous. By the case of *Rowe v. Young (a)*, it was decided on error to the House of Lords that if a bill were accepted payable at the house of P. &

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pleading was concerned, nothing more would be necessary in point of law to allege, in order to constitute a qualified acceptance, than what appeared on the face of this declaration. That was the law decided in the case of *Rowe v. Young*, and was recited in the preamble of the statute 1 & 2 Geo. 4, c. 78. If that was a sufficient allegation in point of law, then under the statute, it became a question of evidence, whether the bill, when produced, would sustain the allegation? Any variance which might exist between the evidence, and the pleading would not appear until the trial. If then it appeared on the face of the declaration that the acceptance was alleged to be special, the omission to allege the presentment of the bill at the place mentioned for payment, was a ground of demurrer. If so, this demurrer could not be set aside as frivolous. Then with respect to the objection that no notice was alleged. The form given by the rules of Trinity Term, 1 Wm. 4, contained an allegation of notice to the acceptor in an action by an indorsee against him. The plaintiff, therefore, was bound to pursue that form, and not having done so, it was a ground of demurrer. For these reasons, the demurrer could not be set aside as frivolous.

Cowling, in support of the rule, contended that with respect to the second ground of demurrer, the allegation was



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the face of the declaration, this appears to be a general or a special acceptance? In the case of *Rowe v. Young* it was decided, that it was a special acceptance. But the act of Parliament provided that such an acceptance shall be a general and not a special acceptance. The words of the statute are, "if any person shall accept a bill, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance." The acceptance as it appears in the declaration, is all I know of the matter, and there it appears to be a general acceptance. If I should hold this a special acceptance, it would, in fact, be to repeal the act of Parliament. Then, as to the second objection, it is true that the form given by the rule of Trinity Term, 1 Wm. 4, contained in such a case, an allegation of notice to the acceptor of the indorsement and other circumstances. But those forms were promulgated previous to the 3 & 4 Wm. 4, c. 42, which gave the sanction of an act of Parliament, to rules of pleading issued under it. The forms so given were merely specimens affecting costs. This appears by the language of the rule to which the forms are attached, for there, it is ordered, "that if any declaration in assumpsit hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this Term, being for any of the de-

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was obtained by the defendant, and the taxed costs amounted to 108*l.* 6*s.* 10*d.* In February, 1832, another action as upon a vacant possession was brought by the same Martin, and judgment and execution signed and issued by him. After this, in January, 1833, the persons making the application brought an action as upon an adverse possession against Martin, and succeeded in obtaining possession of the land. In that action, the amount of the taxed costs was 196*l.* The total therefore of the costs incurred was 304*l.* 6*s.* 10*d.* From that time to the 27th of April, the applicants had treated the land as their own by placing a board on the adjoining premises, intimating that the land was to let upon building leases, and mentioning the name and address of a person of whom inquiries might be made with respect to it. On the 27th of last April, the present lessor of the plaintiff took possession of the ground pursuant to a judgment and execution signed and issued in this action, which was brought as upon a vacant possession. In support of the application, it was sworn to be believed, that the lessor of the plaintiff, claimed under the same title as Mintam Martin. On this state of facts the present application was founded. *Dowling* contended, that this application was unprecedented, as the execution was executed, and possession taken by the lessor of the plaintiff. In all preceding cases, the application was made to stay the proceed-

COURT OF COMMON PLEAS.

Trinity Term

IN THE FIFTH YEAR OF THE REIGN OF VICTORIA.

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SCOTT and Others v. CHAPPELOW.

The rule, which, upon demurrer, requires the statement of the ground of objection to any pleading in the margin of the paper books, by the party joining in demurrer, was intended for the advantage of the Court, and not of the parties.

Where a

ASSUMPSIT by the plaintiffs as drawers against the defendant, as acceptor of two bills of exchange. The declaration contained several counts; the first count was upon a bill dated the 16th of January, 1841, for 1126*l.* 12*s.* 2*d.*, payable three months after date, directed to the defendant, under the name, &c., of "The Talacre Coal and Iron Company," and accepted by the defendant, by one W. Weston: the second count was upon a like bill, payable six months after date; and there was also a count on an account stated.

The defendant pleaded, fourthly, that before the making

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agreed to form the same, being a great number of persons, to wit, two thousand persons, who then became and were the members of the said company, and the said company did then, in pursuance of the said agreement, purchase for the purposes of the said company, and did then become and be, and from thence continually, up to and at the several times of the making of the several bills, &c., were, for the purposes of the said company, possessed of and interested in, divers lands, &c., and did, during and at the several times last aforesaid, carry on divers trades and businesses; and the said lands, &c., and the profits arising from time to time, from the trade and business which they carried on as aforesaid, were divided into a great number of shares, &c., and the interest in the said shares was vested in the members of the said company, for the time being, in various proportions; and the interest in the said land, &c., was vested in the members of the said company, in proportion to the number of such shares in which such members were interested as aforesaid, and the said members were subject to the liabilities of the said company, as between themselves in like proportion; and during and at the said several times, &c., the said company did assume to act, and did act as a corporate body, and did profess that the shares aforesaid were transferable without any

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no other consideration whatsoever; and the plaintiffs always, before and at the said several times of their becoming indorsees and bolders of the said bills, in that behalf mentioned, and of the making of the agreement with them in that behalf hereinbefore mentioned, and of the said accepting of the said bills in the said first and second counts of the declaration mentioned, and before the plaintiffs ever gave any value or consideration for the said bills, whereof they were the holders and indorsees as aforesaid, or either of them, to wit, on the day and year last aforesaid, had notice and knowledge of the premises and matters in this place mentioned, and every of them.
Verification:

Replication de injuriâ.

Demurrer to the replication, assigning for cause, that the matter pleaded in the fourth plea is not matter of excuse, nor any such matters as can be replied to in the manner in which it is replied to in the replication; and that the matters alleged in the said plea ought to have been traversed directly, and in the negative of the terms therein used or otherwise, and not by the general replication de injuriâ, as they are traversed by the said replication; and the said plea contains matter which is either matter of denial of the defendant having been ever liable to perform the promise in the declaration alleged, or else is matter

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books sold and delivered by bills at certain dates, with security for their being honoured, defendant pleaded a custom in London, that upon such sales the security need not be given unless required when the books are delivered, and that the plaintiffs did not require it at that time: the plaintiffs replied generally *de injuriâ*: and it was held, that as the plea did not admit the contract, and offer an excuse for not performing it, the replication was ill. It was clear that the ground of defence set up here was the illegality of the original transaction, and of that illegality the plaintiff was alleged to have notice, and in *Parker v. Riley* (a), *Parke, B.*, distinctly said that such a defence did not amount to mere matter of excuse for the non-performance of the contract declared on, and that *de injuriâ*, therefore, to a plea setting up such a defence, was not a good replication. In *Humphreys v. O'Connell* (b), to an action of assumpsit by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that the bill was accepted for a gaming debt, and that the plaintiff, before the indorsement to him, had notice thereof; and the plaintiff replied *de injuriâ*, and that replication was held good on special demurrer. That case proceeded upon *Isaac v. Farrar* (c), but in *Isaac v. Farrar* the decision was upon the point that the contract was not binding. Here, there was the additional taint of illegality attached to the original

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circumstances disclosed in the plea may be held to be sufficient and good. The plea, as it appears to me, amounts to no more in substance than that the party is excusing himself the non-payment of these bills, on the ground that he never received any consideration for his acceptance of them. In that case, it is a mere matter of excuse, which is always held to be a case in which the replication of *d injuriâ* is applicable, provided that it does not come within the exceptions of *Crogate's case* (a). What is the substance of this defence? It is that certain persons entered into speculation to form a company, which is stated to be one which is endeavoured to be shewn to be against public policy within the statute of Geo. 1 (b), and the plea goes on to say, that there being certain bills of exchange, of which the defendant was the acceptor, they came into the hands of the plaintiffs as indorsers and holders—that is not making them original parties to the bills, or parties to the original illegal transaction. There can be no illegality in taking bills drawn under these circumstances—certainly not more, where the party knows of these circumstances, than is sufficient to disable him from recovering upon them. Now it may be, that if the matter had remained there, the plaintiffs should not have put these bills in suit. But then what does the plea say? It goes on to

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action—the wrong complained of in the declaration, but states some matter in excuse for having done that wrong,—that is to say, such a reason why he has done it as does not claim any interest in land, or set up matter of justification in law, for that is the definition of matter of excuse given in *Crogate's case*, there the plea may be generally traversed by a replication of *de injuriâ*. It would be very hard if it were not so, because there may be many facts stated by the defendant of which the plaintiff may know nothing; and it would be hard to put him to try that, when it may be that all of them are not capable of proof, and he cannot tell which of them are so. Since the new rules, although the declaration does state a promise to pay the bill, the effect of it is, that the plaintiff was the holder of the bill of which the defendant was the acceptor, and that the defendant did not pay it when it became due. All this is admitted by the plea here; a *primâ facie* case of wrong is admitted, and then the defendant says, though I did not pay, I am excused from doing so by circumstances. If those circumstances had arisen out of the authority of the plaintiffs to the defendant not to pay, such as by reason of accord and satisfaction, it would have fallen within the exception in *Crogate's case*, of which the plaintiffs must have taken notice by admitting or denying it, because that is not an excuse within the exception. This

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amend his particulars of demand, by adding thereto certain charges. It appeared that the action had been commenced in the year 1837, to recover the amount of certain claims made by the plaintiff, in respect of services performed by him on behalf of the company of proprietors of a projected railway, of which the defendant was a director. In the month of September, 1837, pursuant to an order of a learned Judge, a bill of particulars was delivered by the plaintiff, in which he claimed 2,127*l.*, the items of which that amount was made up extending over a long period of time. The cause remained undetermined until the 1st of December, 1841, when it came on for trial, and a verdict having been taken for the plaintiff by consent, it was referred to arbitration. The plaintiff now sought to add to his particulars certain items of charge, amounting to 187*l.* 15*s.*, which he claimed for services performed at various periods in the course of the same time, over which his previous demands extended. It was submitted, that the parties having agreed to a reference, that agreement must be taken with regard to their existing position, and that the Court had not the power now to permit any new claim to be made which should alter their relations. [*Tindal*, C. J.—The fear is, that if the plaintiff does not bring forward his claim now, he will never be able to recover it.] The Court could not have let in new matters

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plaintiff's capability of recovering; and may not the defendant say, "I would not have gone to arbitration with the bill of particulars, as it is proposed to be amended." The defendant, at all events, had offered no such answer to this application. *Jones v. Corry and Others (a)*, also shewed the extent to which the Court was disposed to carry the principle here sought to be maintained by the plaintiff. There, in 1835, the plaintiff sued the defendants, as executors, for work done on a house of their testators, and delivered his particulars in July, 1837, after he had commenced a second action against them in their own capacity, for work done to the same house, after the testator's death; both actions were referred to arbitration, and an award made was set aside in Hilary Term, 1839; the plaintiff having abandoned his second action, was allowed, in Trinity Term, 1839, to amend his particulars in the first, by adding to them certain items which had been contained in the particulars in the second.

TINDAL, C. J.—That is a different case, because there, the parties could go on in the regular course of the action. But here, the parties have adopted a peculiar mode of adjusting their differences. What occurs to me is, that the defendant may say that he would not have come into the

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day were both reckoned inclusively, although on the first day of Term it was not usual for the Court to sit until mid-day. The same practice prevailed also with regard to the execution of writs of inquiry under the Reg. Gen. H. T., 2 Wm. 4, s. 67 (*a*). Cases had occurred, in which from circumstances beyond the reach of the parties, the motion for a new trial had been delayed beyond the fourth day, but there, notice of the intention to move had been required to be served on the opposite side by the party moving (*b*). In the present instance, however, it was sworn by the plaintiff's attorney, that until the service of the rule nisi for a new trial, he had no intimation of any intention on the part of the defendant to move for such a rule: and the rule was sworn not to have been served until twelve o'clock on the morning of the 2nd of June.

Shee and *Glover*, Serjts., in support of the rule. The defendant was entitled to move within four clear days after the return day of the distringas. [*Maule*, J.—Why so? Might you not have moved the first thing in the morning of Friday, the 27th of May?] A party could not move until the distringas was returned, and unless it was returned immediately at the sitting of the Court, as his right must accrue from the sitting of the Court the return day would not count.

[*Tindal*, C. J.—There is no fraction of a day in law.]

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pecially as the judgment is perfectly regular, is to say that the judgment may be set aside on payment of costs.

Rule absolute, on payment of costs.

NICHOLS v. STOCKBRIDGE.

In a Middlesex cause, the time for pleading expired on the 30th of May; on that day, the defendant obtained a rule to change the venue to Surrey, which he served at ten o'clock, on the morning of the 31st, but delivered no plea: the plaintiff signed judgment for want of a plea on the same day; *Held*, that the judgment was signed too soon.

THIS was a rule, calling upon the plaintiff to shew cause why the judgment signed, for want of a plea, should not be set aside for irregularity, with costs. The cause was originally a Middlesex cause, and the declaration having been delivered, the defendant had four days' time to plead, which expired on Monday, the 30th May. No plea was delivered on that day, but on Tuesday morning, the 31st of May, at ten o'clock, a rule to change the venue to Surrey, dated of the previous day, and drawn up with a stay of proceedings, was served on the plaintiff's attorney. On the same day the plaintiff signed judgment for want of a plea.

Channell, Serjt., shewed cause. The object of the defendant, in obtaining a rule to change the venue, was to gain time. As the cause originally stood, his four days'

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sum as that for which judgment was taken. A writ of *fi. fa.* was on the next day issued for 514*l.* 16*s.* debt, and 8*l.* 4*s.* costs, and a levy having been made under the writ; on the 9th, 10th, and 11th of March, sales took place. On the 14th March, an application was made under the Interpleader Act, in consequence of a notice by certain assignees appointed under a fiat in bankruptcy issued against the defendant; and the proceeds of the sale were ordered to be paid into Court, to abide the event of an issue, which was directed to be tried. On the 15th of March, the assignees of the defendant took out a summons at Chambers to set aside the writ of *fi. fa.*, on the ground that the mandatory part of the writ did not agree with the judgment, for that by the writ, the debt was stated to be 514*l.* 16*s.*, while from the judgment it appeared to be 1500*l.* The summons was made returnable on the 16th, but was not attended by the plaintiff, and on the same day, a fresh summons was taken out. Pending the second summons, the plaintiff made up and carried in the judgment roll, the judgment being therein expressed to be for 514*l.* 16*s.*; but on the 19th of March, (the second summons being attended and the judgment roll produced) an order was made by Lord *Denman*, setting aside the writ, on the ground of the variance already stated.

Channell, Serjt., in Easter Term, moved for a rule, calling

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stayed, nor does an order, unless it so expresses. The exceptions are, where the applicant has to take the next step, and the application relates to the time or mode of taking that step; as where the summons is for time to plead; for leave to plead several matters (*a*); to strike out a count, &c., cases where a stay of proceedings is necessarily implied (*b*).” If, therefore, the plaintiff was not bound to attend before the second summons was returnable, it was only from that period that a stay of proceedings was secured (*c*). Here, on the 17th of March, the defect complained of was cured, and this being before the period at which the plaintiff was required to attend, under the second summons, there was, when that summons was returnable, and when the order of Lord *Denman* was made, a perfect and complete judgment, which justified the writ of *fi. fa.* The judgment roll was produced to the learned Judge, and the order, therefore, which set aside the writ, must be rescinded.

TINDAL, C. J.—I think that this rule for rescinding the order of Lord *Denman* should be made absolute. At the time when Lord *Denman* made his order, there was in existence, and eventually was produced, a roll of the Court, which sanctioned the writ which had been issued; because there was a record actually produced to him, which shewed



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his pleas by pleading several matters, and an order was made by the learned Judge, in accordance with the defendant's application, a term, however, being imposed, that the plaintiff should be entitled *absolutely* and *at all events* to try at the then sittings. The defendant delivered his pleas on the same evening, but the Judge's order was not served until the following Monday, the 21st of February. On Tuesday, the 22nd of February, the cause was called on for trial, when, after the jury had been sworn, the defendant's attorney having obtained permission to look at the record, discovered that it contained no proper award of venire, and that the blanks which had been left for the insertion of the dates of the teste and return of the writs of venire and habeas corpora were not filled up. It was then objected that the cause was coram non judice, and that the learned Judge had no authority to try the cause, but the objection being over-ruled on the ground, that the jury having been sworn, it had been waived, the trial proceeded, and the plaintiff obtained a verdict. The defendant subsequently sued out a writ of error, and in Easter Term obtained a rule, in this Court, for setting aside the trial and verdict on the same grounds which had been urged as objections at the trial. In the same term, the plaintiff also obtained a rule for leave to amend the record, it being sworn that the omissions arose from the

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COLTMAN, J.—I am of the same opinion: and I think that the writ of error prevents the defendant from taking these objections.

Rule discharged.

Sir T. Wilde, Serjt., then moved that the plaintiff's rule for leave to amend be made absolute. The objections of the defendant being against good faith, the plaintiff was entitled to amend.

Bompas, Serjt., contended that, according to the authorities, this was a case in which the amendment could not be allowed.

TINDAL, C. J.—The order of my brother *Cresswell* should have operated upon the good faith of the parties. This rule must be made absolute.

Rule absolute.

THE THAMES HAVEN DOCK AND RAILWAY COMPANY v.
 ROSE.

The 108th
 section of the
 6 & 7 Wm. 4,

BOMPAS, Serjt., moved (31st of May) on behalf of the defendant in this action for a rule to shew cause why the

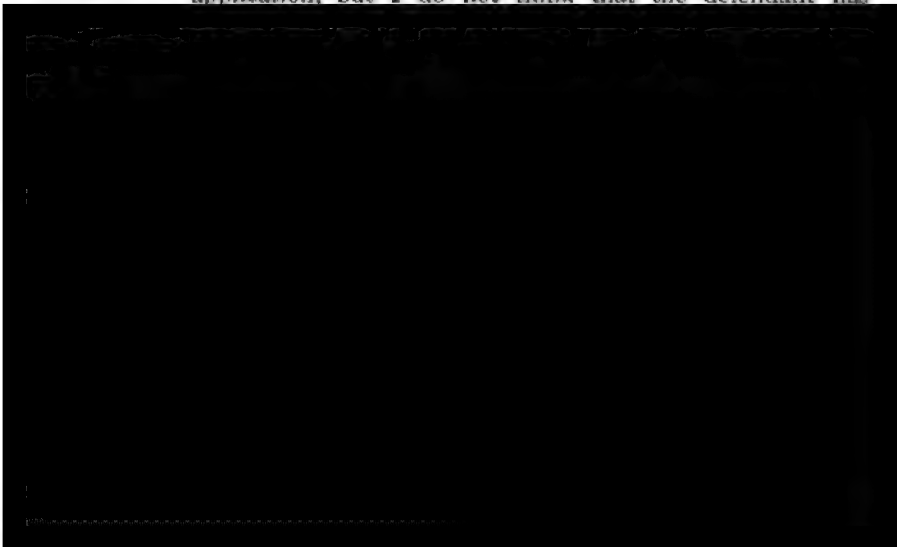
1842.
The THAMES
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ground of the present application was, that although the action was brought in the name of the company, the present board of directors, by whose authority the proceedings were instituted, was insufficiently constituted, the number of persons acting as directors being seven only, instead of twelve. [*Maule, J.*—The 112th section provides only, that “it shall be lawful” for the directors to fill up any vacancy in the direction caused by death or other means. It does not say that there shall always be twelve directors. Is there any section fixing the number of directors who shall form a quorum at any of their meetings?] Section 116 provided that “no meeting of directors shall be deemed a court competent to enter and determine upon business, unless at least five directors shall be present at the commencement of business, and when a decision takes place upon the whole or any part of the business.” The quorum of five, however, could only carry on the business of the company as the representatives, and in the place of the whole twelve directors, and if the number of twelve was reduced by any circumstance, the remaining directors must take immediate steps to complete the direction. [*Tindal, C. J.*—There must be some interval; you would make the constitution of this company such as that it would be constantly falling into improper acts. *Maule, J.*—It may be that there are not twelve members of the

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tiff, and the defendant in his own private capacity. When the act is looked at, the 123rd section states that the calls when due shall become a debt from the proprietors of shares, and also that the company may sue for them. Stopping there only, it appears that the company have sued, and that clause is an authority to do so. It is sought to be engrafted on that provision, however, that in another part of the act, there is a clause that the proceedings and management of the company shall be committed to twelve directors. It appears to me, that this is matter of direction only, but if at any time the number shall fall short, individuals may insist by mandamus, that the vacant places shall be filled up. If, as you say, it is a condition that there shall be twelve directors, that might have been shewn by plea, and the question might have come before the Court on demurrer. But applying as you do to the equitable jurisdiction of the Court, as these are the proper parties, and as your debt is admitted, we should not, I think, at this time at least, interfere.

COLTMAN, J.—The summary jurisdiction of the Court upon matters of this nature, should never be exercised except for the purpose of administering justice. There ought to be some color shewn upon the act for this application, but I do not think that the defendant has



1842.

Re HESTER MURPHY.

The Court refused to dispense with the concurrence of the husband of a married woman on an application by her under the 91st section of the Fines and Recoveries Act, (3 & 4 Wm. 4, c. 74,) to be permitted to convey her interest in an estate, although it was stated that he and the applicant were living apart by mutual consent, and that he was in a "very nervous and excitable state, and that it would be very difficult, if not impossible to procure the execution by him of any deed," until it was sworn that

CHANNELL, Serjt., applied that the Mrs. Hester Murphy, a married woman, might be permitted to convey her interest in a certain estate, without the concurrence of her husband, under the provisions of the 3 & 4 Wm. 4, c. 74, s. 91. That section enacted, "That if a husband shall in consequence of being a lunatic, idiot, or of unsound mind, &c., or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas, at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of the husband," &c. In the present instance, the applicant and her husband had been living apart by mutual consent during the last four years, and it was sworn that the husband was in a "very nervous and excitable state, and that it was believed that it would be very difficult, if not wholly

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BARTHOLO-
MEW
P.
CARTER.

Martin having shewed cause against that rule,

The *Court* now (7th of June,) decided to have the case argued upon the question, whether upon the facts, as they appeared at the trial, the action fell within the statute.

Humfrey, for the defendant, argued that the detention of his clothes by the plaintiff was obviously an unlawful act; for, by the 16th and 19th clauses of the act, the property in them was vested in the receiver of police; and that the defendant had acted only in pursuance of the regulations of the police force, and of the orders of the commissioners of police, in causing his detention. By a more recent act, (2 & 3 Vict. c. 47,) which came into operation on the 17th of August, this occurrence having happened on the 26th of July, the offence of detaining police clothes was made punishable with imprisonment. The defendant might well have supposed that he was authorized in causing the detention of the plaintiff.

Martin, *contra*. There was nothing in the whole scope of the statute to authorize the detention of the plaintiff on this charge.

Cur. adv. vult.

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 MAUND
 v.
 The MON-
 MOUTHSHIRE
 and STAF-
 FORDSHIRE
 CANAL Co.

admitted. In an *Anonymous* case (*a*), it was laid down by *Holt*, C. J., that a corporation could not be indicted, but that particular members of it were subject to such process. *Morgan v. The Corporation of Carmarthen* (*b*), shewed that an attachment could not lie against a corporation. *Vin. Abr.* tit. "*Corp.*" B. a (2), and *Dursfield v. Jones* (*c*) were also referred to.

Ludlow, Serjt., and *Channell*, Serjt., now shewed cause. No distinction could be drawn in principle between trover and trespass; and in *Yarborough v. The Bank of England*, it had been distinctly held that trover was maintainable. The dictum in *Com. Dig.* rested entirely upon old authorities, which were inapplicable to the numerous relations of late created by the Legislature, by calling into existence and operation so many new trading corporations. The ancient doctrine had been, besides, altogether destroyed by the recent decision in the Court of Queen's Bench, in the case of *Regina v. The Birmingham and Gloucester Railway Company* (*d*), where it had been held, that a corporation was liable to indictment. *Kyd on Corporations*, vol. 1, p. 223, was referred to.

Talfourd admitted that he could only rest his case on the old authorities.

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DAVIDSON,
Public Officer
v.
BOWER.

Channell, Serjt., in Easter Term, moved for a rule for a new trial, on the ground of mis-direction, and also in arrest of judgment; it is necessary to repeat the arguments and the decision upon the latter point only. The objection was, that the plaintiff was not sufficiently described upon the record as the public officer of any banking co-partnership, under the 7 Geo. 4, c. 46. The declaration only alleged that the plaintiff was the public officer of certain persons united in co-partnership "for the purpose" of carrying on the trade of bankers. It was perfectly consistent with this allegation, that the business of bankers had never been carried on at all, while the 9th section of the statute distinctly contemplated co-partnerships actually carrying on business. In a recent case of *Fletcher v. Crosbie (a)*, the same objection had been taken to a declaration which was precisely similar to that now before the Court, upon special demurrer, and had been held good, but leave had been given to amend by inserting the word "and," before the words "carrying on," which met the objection raised. There, the only question was, whether the objection could be raised otherwise than on special demurrer? It was submitted, however, that it was an objection which went to the very foundation of the action, and that in the absence of a statement of the fact, that the co-partnership was actually carrying on business, no sufficient cause of action was made

1842.

ELLIS v. STEBBING.

Judgment as in case of a nonsuit may be moved for in a town cause, where issue is joined in, or in the Vacation before, a Term, in the second Term next after, namely, the third Term inclusive; in a country cause, issue being joined in, or in the Vacation before, an issuable Term, the motion may be made after the lapse of two Assizes; issue being joined in, or in the Vacation before, a non-issuable Term, the motion may be made after the lapse of one assize.

CHANNELL, Serjt., shewed cause against a rule, obtained on behalf of the defendant in this action, for judgment as in case of a nonsuit. It was a country cause, and issue had been joined on the 8th of December, 1841, in the vacation before Hilary Term last. It was submitted that the plaintiff had until the summer assizes to go to trial.

Talfourd, Serjt., in support of the rule. [*Tindal*, C. J. —There was a case decided in the Court of Exchequer in the course of the present Term, in which a general rule of practice was laid down. It is desirable that all the Courts should be bound by the same rule.] The decision of the case was then postponed for the purpose of inquiry being made into the case in the Court of Exchequer.

Talfourd subsequently produced and read to the Court the following memorandum, which he stated, he had procured from the Masters of the Court of Exchequer, to whom it had been handed by *Alderson*, B., as the resolution of the Court upon the practice to be adopted.

1842.

Ex parte
FLEETWOOD,
Bart.

Accountant General of the Exchequer (*a*) to the senior Master of this Court, he might enter a discharge in his book or index. This application was rendered necessary by the 2 Vict. c. 11, ss. 8 & 9. Section 8 provided, "that no obligation or specialty which shall hereafter be made to her Majesty, in the manner directed by the 33 Hen. 8, c. 39, shall affect any lands, tenements or hereditaments, as to purchasers or mortgagees, unless, and until a memorandum or minute containing the name and the usual or last place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the sum in which the obligee shall be bound, or for which the obligation or specialty shall be made, and the date of the same shall be left with the senior Master of the Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled 'The Index to Debtors and Accountants to the Crown,' in alphabetical order," &c. Section 9 provided, "That wherever a quietus shall be obtained by a debtor or accountant to the Crown, and an office copy thereof shall be left with the senior Master of the said Court of Common Pleas, together with a certificate signed by the Accountant-General, that the same may be registered, the said Master shall forthwith enter the same in the said book of debtors and accountants to the Crown in alphabetical order." &c. The quietus would

1842.

TAYLOR

v.

LORD
STUART DE
ROTHSAY.

writ might be granted, it was submitted, to compel appearance. [*Maule*, J.—I have granted writs of *distringas* at Chambers, to compel appearance, under similar circumstances.]

The Court granted a writ to compel an appearance.

MALONY v. STOCKLEY.

In debt for money had and received, and on an account stated, the defendant pleaded *nunquam indebteditus*, payment, and set-off; the cause and all matters in difference were referred to an arbitrator who directed a general verdict to be entered for the defendant: *Semble*, that there was no inconsistency in the

DEBT for money had and received, and on an account stated. Pleas, never indebted, payment, and set-off, whereon issue was joined. The cause went down to trial, when a verdict was taken for the plaintiff, subject to the award of a legal arbitrator, who was empowered to direct a verdict to be entered for the plaintiff or the defendant, and to decide on all matters in difference. It was directed, that the costs of the cause should abide the event of the suit, the costs of the reference to be in the discretion of the arbitrator. There were no matters in dispute besides those involved in the cause, and the arbitrator made his award, directing the verdict found for the plaintiff to be set aside, and a verdict to be entered for the defendant.

1842.

MALONY

v.

STOCKLEY.

trator was not called upon to give a decision on each issue for the mere purposes of costs, unless requested to do so by the parties. That decision was subsequently confirmed upon this point in the case of *Duckworth v. Harrison* (a). [Maule, J.—It may be that the arbitrator thought that the plaintiff had not a cause of action, but that the defendant had a set-off; all that he says is, that the defendant is entitled to a verdict. What inconsistency is there in a man having a set-off against another man, who has no real cause of action against him? I can see nothing inconsistent in it.] In *Williams v. Mouldsdaie* (b), in debt for use and occupation, goods sold, money paid, and on an account stated, the defendant pleaded *nunquam indebitatus*, and a set-off; a verdict was entered for the plaintiff at nisi prius, subject to a reference of the cause to an arbitrator, who was to certify whether the verdict should stand, and for what amount, or whether it should be vacated, and a verdict entered for the defendant; the arbitrator directed a verdict to be entered for the defendant on both issues, and the Court held that there was no inconsistency. There, *Fenton v. Dimes* (c), was cited. That was an action of assumpsit, to which there were pleas of non assumpsit, payment, and set-off. The cause, and all matters in difference were referred to an arbitrator, who directed a general verdict to be entered for the defendant. The Court set aside the award on the

1842.
PADDOCK
v.
FORRESTER
and Others.

his taxation of costs in this suit. It was an action of trespass, for breaking and entering the lands of the plaintiff, and for digging, turning up and subverting the soil, making mines, pits, shafts and holes, and raising and getting divers large quantities of coals, culm, earth, soil, stones, ore and other minerals, and seizing, taking, carrying away, and converting the same. The pleas were, first, not guilty; secondly, that the plaintiff was not possessed of the coals and minerals; the third, fifth and seventh pleas set up a justification as servants of the Crown, under an immemorial right of mining; the fourth, sixth and eighth pleas alleged a similar right, and set up a similar justification, stating the right to be subject to making compensation for surface damage; the ninth and tenth pleas were general pleas of justification as servants of his late Majesty and of her present Majesty; the eleventh plea was a plea of the Statute of Limitations; and the twelfth, was a general plea of not possessed. By the replication, issue was taken on the first, second, eleventh and twelfth pleas; to the third, fifth and seventh pleas, the plaintiff replied, traversing the prescriptive right alleged therein; to the fourth, sixth and eighth pleas, there was a replication alleging a claim of compensation, and a refusal on the part of the defendant to satisfy that claim. Issue.

1842.
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v.
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the tender of sufficient compensation. The witnesses in question were called to support the first of these propositions, and although that arose under the third, fifth and seventh issues, yet it also formed part of the fourth, sixth and eighth issues, and the defendants having succeeded upon the latter, they were entitled to the costs of the witnesses, whom they had subpœnaed to prove this part of their case.

Talfourd, and *Channell*, Serjts., in support of the rule. The witnesses were subpœnaed to prove the right of the Crown to enter the land; that question arose upon the third, fifth and seventh issues, but the plaintiff had succeeded upon them, because he had shewn that the right was qualified. The defendants, therefore, could not be entitled to the costs of proving a fact, which had been negatived. The distinction in favor of the plaintiff was, that the defendants had proved their right to the coals, but had not proved their right to enter the plaintiff's land and to take them. The question arose more directly under the second issue, which had been entered distributively, and under which this distinction more particularly presented itself. [*Tindal*, C. J.—Must not the pleas be taken singly? Supposing the plea of not possessed only had been on the record, would not the defendants be entitled

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day, and the costs had been taxed at the above amount, and the Master's allocatur indorsed on the rule. The question upon which the defendant sought to obtain the opinion of the Court was, whether the 1 & 2 Vict. c. 110, s. 18, which gives rules of Court the effect of judgments, would enable a party to sue out execution upon a rule such as that originally obtained by the defendant, or whether the precise amount for which he was entitled to judgment, must not appear on the face of the rule. The practice was for the defendant to move for a rule for the costs of the day, which was served by him on the plaintiff with an appointment to tax. It was submitted, that the taxation having taken place, and the allocatur being indorsed on the rule, no fresh rule, by which the actual amount of the judgment to be sued out was fixed, was requisite; but some doubt was entertained upon the point since the case of *Jones v. Williams* (a). There, under an agreement of reference, a sum was awarded to be paid by the plaintiff to the defendant, and afterwards the agreement was made a rule of Court, and it was held that the defendant could not, by virtue of the rule of Court, issue execution for the sum under the 1 & 2 Vict. c. 110, s. 18, that clause being applicable, for such purpose, only where the money payable by the rule of Court is expressed in the rule itself. [Tindal, C. J.—The 18th section of the act provides,

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The 3 & 4
Vict. c. cxxvi.
s. 1, provides
"that all actions
or suits against
any persons
already in-
debted, or who
may be here-
after indebted
to the Mon-
mouthshire
Iron and Coal
Company," and
all other pro-
ceedings upon
or in respect of
any present or
future liability
to the said
company, or
upon any bonds,
covenants, con-

tracts, or agreements, which already have been or hereafter shall be given or entered into, to or with the said company, or wherein the said company is or shall be interested, against any persons, whether they are or may have been proprietors of the said company or not, shall and lawfully may be commenced, prosecuted, or carried on in the name of the secretary of the said company, &c. : *Held*, that under those provisions, the secretary of the company was authorized to commence and carry on an action of debt for calls against a proprietor of shares in the capital of the company, and that the act was not intended to confer such a right upon him in actions between the company and third persons only.

In an action of debt for calls by the Secretary of the Monmouthshire Iron and Coal Company, the declaration alleged that the defendant was the duly registered proprietor of sixty shares in the undertaking, and recited, that by a certain indenture of settlement, bearing date, &c., to wit, the 25th of October, 1836, it was provided that there should be a board of directors of the said company; that the directors should meet together, and that it should be lawful for them, whenever they thought proper, to come to a resolution that the proprietors of shares in the capital of the said company, (except the proprietors for the time being of certain shares in the said

DEBT. The plaintiff sued as secretary for the time being, duly appointed and enrolled in that behalf, of the Monmouthshire Iron and Coal Company, being a company mentioned in the 3 & 4 Vict. c. cxxvi, an act passed to enable the said company to sue and be sued in the name of any of their directors, or of their secretary, and to raise money for carrying on their works, and complained of the defendant, who had been summoned to answer the said plaintiff, by virtue of a writ issued on the 25th of May, 1841, in an action of debt, and as such secretary, demanded of the defendant the sum of 152*l.* 15*s.* 9*d.* &c., for that whereas, before and at the time of the making of the call for money hereinafter mentioned, the defendant was the

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2*l.* 10*s.* upon every share in the said capital (except as aforesaid) as the board of directors should from time to time think necessary, until the whole amount of the said shares respectively should be paid up. The declaration then went on to state the mode in which the calls were to be made, and having described the concluding provisions of the deed of settlement, alleged that afterwards, and whilst the defendant was such proprietor of sixty shares in the capital of the said company, and after the execution by the defendant of the said deed of settlement, to wit, on the 22nd of December, 1840, certain persons, &c. duly constituting and being a board of directors, for the management of the affairs of the said company, &c. at a certain meeting held pursuant to the said indenture of settlement, at the office of the said company at Bath, duly made a call of money for the purposes of the said company, according to the provisions of the said indenture of settlement, of and from the proprietors of shares in the capital of the said company, to wit, a call or instalment of 2*l.* 10*s.* upon every share in the capital of the said company (except the said exempted shares) to be paid and payable on the 16th of January then next following; such call or instalment not exceeding in respect of any one share the call required on any other share, and the same not being made so payable as aforesaid, till more than three calendar months after the

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Secondly, there was nothing in the declaration to shew that the shares held by the defendant did not form a

company called 'The Monmouthshire Iron and Coal Company,' and all actions, suits, and other proceedings whatsoever, at law or in equity, for any injury or wrong done to any real or personal property of the said company, or upon or in respect of any present or future liability or liabilities to the said company, or upon any bonds, covenants, bills of exchange, promissory notes, contracts, or agreements which already have been or hereafter shall be given or entered into, to, or with, the said company, or to, or with, any person or persons whomsoever, in trust for the said company, or to or with any person or persons for the use or benefit thereof, or wherein the said company is or shall be interested, and all instruments, petitions, and other proceedings for or incidental to the issuing or prosecuting any fiat in or commission of bankruptcy in England or Ireland, or any security

or fiat in bankruptcy, or under any sequestration by, for, or on behalf of the said company, or wherein the said company is or shall be interested or concerned, and generally all other proceedings whatsoever at law or in equity, to be commenced, instituted, or carried on by or on behalf of the said company, or wherein the said company is or shall be concerned or interested, against any person or persons, or body or bodies politic or corporate, or others, whether such person or persons, or any of such persons, or such body or bodies politic or corporate, or any member or members thereof respectively, is or are, or shall be or shall have been a proprietor or proprietors of the said company or not, shall and lawfully may be commenced, made, executed, instituted, presented, and prosecuted or carried on in the name of the secretary of the said company for the time being, or

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to the objection that the shares of the defendant were not alleged to be non-exempted shares. It was to be observed, that this was not stated as a cause of demurrer, and on this point therefore the case stood as if there was a general demurrer only to the declaration. The call was stated in the declaration to be made upon "the proprietors of shares in the capital of the said company, to wit, a call or instalment of 2*l.* 10*s.* upon every share in the capital of the said company, (except the said exempted shares)"; and the declaration also contained these words, "and the plaintiff further saith, that the proportion or instalment of the said defendant so called for in respect of his said sixty shares in the capital of the said company amounts to a large sum of money, to wit, the sum of 150*l.*" This allegation could not be true, unless the defendant was the proprietor of unexempted shares, and coupling the two allegations together, the shares of the defendant were sufficiently shewn to be non-exempted shares, and the declaration was good upon general demurrer. *Davis v. Lovell* (*a*) was cited. Secondly, the action was well brought by the secretary of the company although the defendant was a proprietor of shares. The preamble of the act shewed that it was the intention of the Legislature that this was a case which should fall within its provisions: because, having recited the deed of settlement of the company, it proceeded, "And whereas the present

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Hughes v. Thorpe (a), was referred to. Thirdly, as to the formal objections, that the declaration contained no allegation that three calendar months had elapsed between the date of the deed of settlement, and the period when the call sued for became payable, and between the time when the call became payable and any former call. As to the last objection, the declaration distinctly alleged that the call was "duly" made; and further, it averred that the call was not made payable "till more than three calendar months after the day appointed for payment of any previous instalment." As to the first objection, the declaration having alleged the call to have been made on the 22nd of December, 1840, and to have been declared payable on the 16th of January, "then next," clearly indicated the date when the call became due. The Court would take judicial notice of the date of the passing of the act of Parliament (b), which was the 4th of August, 1840, and as the preamble recited the deed of settlement, it was clear that that instrument must have been executed antecedent to that date, and of course, more than three months before the 16th January, 1841.

Channel, Serjt., replied, and cited *Parkinson v. Whitehead* (c).

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statute, as by section 4, he can only be liable to one action on the same subject matter of demand. Two other objections of a formal nature were urged against the sufficiency of the declaration. First, that it appears by the declaration that there were a certain number of shares which were exempted from having calls made thereon, and that it does not distinctly appear that the shares of the defendant were not the exempted shares. But we think that the direct allegation in the declaration, "that the proportion or instalment of the defendant so called for in respect of his sixty shares in the capital of the company" amounted to such a sum of money, is, by necessary implication and intendment, an allegation that those shares were not exempted from liability, for had that been the case no proportion or instalment whatever would have been due upon them. And as to the mere formal objections, that there is no allegation that the call was not made until after the expiration of three calendar months from the date of the indenture; and after the expiration of three calendar months from the time appointed for the payment of any former instalment, we think there is no ground for either. For, as to the last, the declaration, besides containing a distinct allegation that the call was made according to the provisions in the said indenture, avers also, "that the same call was not made so payable till more than three calendar

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still is indebted to the plaintiffs in the same, and an action hath accrued to the said company by virtue of the said act of Parliament, to demand and have, of and from the defendant, the said sum of 250*l.* above demanded; yet the defendant, although often requested so to do, hath not as yet paid the sum of 250*l.* above demanded, or any part thereof, but so to do hath wholly refused, and still doth refuse, to the damage of the said plaintiffs, of 500*l.*


The defendant pleaded, true it is, that heretofore and before the commencement of this suit, to wit, on the said 6th of March, in the declaration mentioned, the defendant was the proprietor of the said shares in the said undertaking in the declaration mentioned; that the said call in the said declaration mentioned, was made under, and pursuant to, the provisions of the said act of Parliament, for an instalment of 5*l.* per share, to be paid by the proprietors or owners of the capital of the company, on or before the 9th day of April then next ensuing. But that afterwards, and before the commencement of this action, and before the said 9th of April hereinbefore mentioned, when the said call was payable as aforesaid, to wit, on the 7th of April, 1838, he the defendant being such proprietor as aforesaid, then sold and disposed of all his said shares in the said undertaking (the said shares being the same shares in respect of which the plaintiffs claim to be paid the said

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said act of Parliament in the declaration mentioned: Verification.

Demurrer, stating the following causes:—For that the plea does not traverse, or confess and avoid the cause of action stated in the declaration, or that the defendant was indebted as therein alleged; that if the said plea is pleaded by way of traverse, then that the same is an argumentative, and not a direct denial of the matters charged in the declaration, and the same improperly concludes with a verification, instead of to the country; and for that the said plea amounts to a plea that the defendant never was indebted as in the declaration alleged, and should have been so pleaded; for that if the same plea is intended to be pleaded by way of confession and avoidance, then that the same does not sufficiently, or at all, confess that the defendant ever became, or was indebted, as in the declaration alleged, or if it does sufficiently confess such liability, that it shews no matter by which the same has been discharged; for that the said plea does not aver or shew that the said C. Thompson ever became liable to pay the said call; for that the said plea does not sufficiently admit or deny that the said defendant was a proprietor of the shares in the declaration mentioned, or a subscriber to the said undertaking at the time the said call was made, or that due notice was given of the making of the said call so required



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the defendant in his plea had shewn enough to discharge him from all liability to the payment of any future calls,

such certificate or ticket shall not hinder or prevent the proprietor of any of the said shares from selling or disposing thereof; and such certificate or ticket may be in the words or to the effect following," &c.

Sect. 93. "And be it further enacted, that the said company shall, in some proper book to be provided by the said company for that purpose, enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to any share therein; and every proprietor of the said undertaking (or in the case of a corporation, the clerk or agent of such corporation duly appointed) may, at all convenient times, have recourse to and peruse such books *gratis*, and may demand and have copies thereof, or of any part

enacted, that the several parties who have subscribed, or who shall hereafter subscribe for or towards the said undertaking, shall, and they are hereby required to pay the sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors of the said company, under and by virtue of the powers of this act, at such times and at such places, and to such persons as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said company to sue for and recover the same in any Court of law or equity, together with interest on such unpaid sum of money, at the rate of 5*l.* per cent. per annum from the time when the same was directed to be paid, up to the day of actual

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but it was urged that he had by no means divested himself of the liability to the call made before that transfer, and

respect of any call, it shall be sufficient for the said company to declare and allege, that the defendant being the proprietor of a share in the said undertaking, is indebted to the said company in such sum of money as the calls in arrear shall amount to for a call, or so many calls, of such sums of money upon a share belonging to the said defendant, whereby an action hath accrued to the said company by virtue of this act, without setting forth the special matter: And on the trial of such action it shall only be necessary to prove that the defendant at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever, and the said company shall thereupon be en-

the said company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his share therein."

Sect. 131, "And be it further enacted, That it shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, and administrators, and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned."

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taking, &c. Section 101, which enabled proprietors to sell shares, contained words which might for a moment be supposed to produce a difficulty, but upon a careful examination of their tendency, it would be seen that they were in furtherance of those enactments to which allusion had been made. That clause provided that the shares should be sold, "subject to the rules and conditions herein mentioned." There was no condition which rendered the purchaser of shares subject to the existing liabilities of the preceding shareholder, and this expression must be taken to refer only to the general rules of the society. Section 102, which enacted, that no shares should be sold after a call was made until the call was paid, carried the case a step further, and seemed clearly to substantiate the liability of the defendant in this action. In the action brought by *The Aylesbury Railway Company v. Thompson*, Lord Denman, C. J., said, "The plaintiffs contended that the owner of the share at the time when the call became payable, was bound to pay it, and they relied on the language of the 96th and 102nd sections for this purpose: the first of these is not carefully worded; it seems not to have contemplated the case of a transfer between the day of making the call and its payment." Having then referred to the provisions of the clause, his Lordship added, "It is certainly not possible to apply all these provisions to the

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must be taken to be impliedly contained in the declaration, by reference to the act ; and that therefore the pleas, being in denial of a matter necessarily implied in the declaration, ought to have concluded to the country, and not with a verification, and were on that ground bad on special demurrer ; and in that case also, it seemed to be thrown out that a plea of *nunquam indebitatus* would have sufficiently put in issue all the matters required by the act to be proved in support of the action. The plea was also a bad plea in confession and avoidance, for it did not confess the liability of the defendant. It ought to have admitted the defendant's liability, and to have shewn how that liability was discharged, but it sought to shew that the defendant had never been liable. If, however, it was a good plea in confession, it did not sufficiently avoid the liability which it admitted, because it did not sufficiently allege the liability of Thompson.

Stephen, Serjt., for the defendant. Supposing that the plea was in substance sufficient, the declaration was bad, because it did not allege, that at the time of the action being brought, the defendant was a proprietor of shares. The plea was in substance sufficient, and the judgment of the Court of Queen's Bench, in the case which had been referred to, shewed that this was a *casus omissus*,

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the previous part of the argument was correct, this suggestion could not prevail, and this clause in truth carried the point a degree further, because it must be taken to mean that the shares sold carried with them whatever liabilities had already attached to them. But the 102nd clause still more plainly indicated the intentions of the Legislature; that clause provided that no share should be sold on which any call should have been made after the day of payment of the call, until the amount called for should have been paid. This clause, if any conclusion was to be derived from it, impliedly provided that shares might be sold after the call was made, and before it was satisfied. But looking at the provisions of the various clauses, it was to be found that in most of them the statute evidently contemplated the fact of the defendant being a proprietor at the time of action brought; and this fact not only supported the general argument, that the statute contemplated the liability only of the actual holder of the shares at the time of the call accruing due; but also supported the objection to the declaration, of which the defendant had given notice in his points for argument upon this demurrer. This provision was to be found precisely framed in the 98th section, which gave the form of declaration, at the end of which it was enacted, that the facts required to be proved "shall be

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respect, as well as that with regard to the supposed contemplation of the defendant, in the character of a holder of shares, at the time of action brought, must be taken with the other enactments of the statute upon which it had been urged that the defendant's liability arose. The declaration, therefore, must be deemed to be good, notwithstanding the objection raised to it by the defendant. With reference to this being a *casus omissus*, the Court had already thrown out an intimation of its unwillingness to adopt such a conclusion. The defendant had failed to shew that his plea was a good plea. Either the defendant must shew that he never was, at any time, indebted, in which case he should have pleaded *nunquam indebitatus*; or if he meant to plead in confession and avoidance, he must shew that there was a time when he was indebted, which could only be shewn by an admission that the act of Parliament did bear the construction sought to be put upon it by the plaintiffs, and that his liability had been since avoided or discharged. It was, in truth, neither a plea in confession and avoidance, nor a plea of *nunquam indebitatus*, and the plaintiffs were entitled to judgment.

Cur. adv. vult.

In Trinity Term, 1842, the judgment of the Court was delivered by



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102, prohibits sales only after the day of *payment* of a call, unless it be paid; it is clear that a sale may lawfully be made, and the company be required to enter a memorial of such sale, after a call has been advertised, and before the day of payment has arrived; and section 90, by giving a remedy against the owner under the transfer, clearly assumes that he, and not the party who has transferred, and who has ceased to have any right to the dividends, is to be considered as the party to pay the call. In addition to these considerations, it may be observed, that though section 98 does not prohibit actions other than such as are within its provisions, and though, if a clear right of action were given by some other part of the act against owners, other than those for the time being, it would not be taken away by this section, yet its provisions go far to shew, that an action against a shareholder, who had ceased to be an owner when the right of action arose, was not in the contemplation of the Legislature. This section is applicable in terms, only to "any action against any proprietor for the time being;" the form of declaration given by this section is, that the defendant, "being a proprietor, is indebted" to the company for a call upon a share belonging to the defendant. The case of a sale between the notice to pay an instalment, and the day of payment, is one so obviously likely to be of frequent occurrence, that it is pro-

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appear to be "such action," the declaration is required to allege that "the defendant, *being* a proprietor, is indebted;" if that allegation is admitted, the admission shews it to be such action; if it be denied, the section immediately after the clause in question, goes on to give a mode of proving it, in these words; viz. "and in order to prove that the defendant was a proprietor of a share in such undertaking as alleged," the production of the book shall be *primâ facie* evidence, &c. This Court is not called upon to say, whether the decision of the Queen's Bench is correct or not; it is sufficient that it appears to us that no right of action for a call is given by the act, or exists independently of it, against a party who has held a share at the time the call was made (not appearing to be an original subscriber), who has transferred and entered a memorandum of his transfer before the call was payable. It is clear, that the declaration in this case is not in the form given in sec. 98, of the Railway Act, for to be within that section it should allege that the defendant "being a proprietor of a share is indebted to the company," but there is no allegation in this declaration, that the defendant, being a proprietor, is indebted. But as it might be, that a right of action might be given by some other part of the act, in a case such as that stated in this declaration, it was necessary to consider, whether such right of action were in fact given. And it appears to us, on a

defendant to be a proprietor, or a subscriber, but it may be contended that it substantially shews a case of the third description, and must be taken, not being demurred to, to insist on the right which under sec. 101, may exist against a former shareholder. Probably upon the true construction of the act, such a person ought to be treated as an actual shareholder; but supposing this to be otherwise, and that the declaration is to be considered as shewing a cause of action, it is answered by the plea, which on this supposition is good in substance, because it shews that the defendant, having transferred his shares and entered a memorial of the transfer before the call was payable, is not liable; and good in form, because, as it admits all the matters of fact stated in the declaration, (which are only that the defendant was a proprietor, that a call was made, and that it remains unpaid), and by introducing affirmative matter not inconsistent with those facts, shews that notwithstanding those facts, the defendant is not liable; it confesses and avoids the matters of fact stated in the declaration; and properly concludes with a verification, and not to the country. It may be suggested that a party who becomes a shareholder, at once becomes liable to pay all the unpaid instalments that may be called for by the directors, and that consequently when an instalment is called for, it is debitum in præsentì solvendum in futuro; and that the shareholder, at the time the call was made, being the debtor, should, therefore, be the party to pay; but the general scope of the act is, to treat a shareholder (at least one who takes by transfer and is not an original subscriber), as identified with his share, and as having nothing to do with the company, either with respect to rights or liabilities before he becomes, or after he ceases to be a shareholder; the express provisions of the act giving remedies by action, by forfeiture, and by withholding dividends against those who held the shares at the time the call was payable; and the absence of any express provision continuing the liability of a shareholder, of whose transfer a memorial is entered, shew that the act considers the debt

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as not arising till the day appointed for payment. The duty of a shareholder, who takes by transfer, to pay a call, is the creature of the act; the act requires the payment to be made at the time appointed by the directors; at that time, and not before, the duty arises, and it is a duty which by the terms of the act is cast on the owner for the time being. On the whole, therefore, we think that this action cannot be maintained, and that the judgment ought to be for the defendant.

Judgment for the Defendant.

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 London, GOVERNORS OF CHRIST'S HOSPITAL.

At the trial of
 a cause, a ver-
 dict was taken
 for the plain-

THE declaration stated that the plaintiff, before and at the time of the committing of the several grievances by the

tiff, "subject to the award, order, arbitrament, final end and determination," of a legal arbitrator, who was authorised to award the verdict to be entered for the plaintiff or defendant, or a nonsuit to be entered, as he should think fit, and who was directed "at the request of either party to state any point of law upon the face of his award for the opinion of the Court:" *Held*, that it was not necessary for him to decide as to the amount of damages to be finally recovered, and to direct how judgment should be entered up, but that having disposed of all the issues separately, and having assessed damages separately, in respect of each subject matter of complaint stated in the declaration, and having at the request of both parties raised questions for the opinion of the Court, his award was good.

The declaration alleged that the plaintiff was possessed of a house, and that the defendant was also possessed of a house next adjoining to that of the plaintiff, and that the defendant contrived to injure the plaintiff by his agents and workmen, behaved and conducted himself as

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so doing, they erected and placed a certain hoarding in front of their said houses, in such a manner, that the said hoarding enclosed a part of a public footway in the said street, running in front of the said houses of the plaintiff and defendants respectively, to wit, &c., and thereby in part obstructed the said footway, and the approach to the said house of the plaintiff, and the passage of persons passing and re-passing, on foot, on the side of the said street on which the said plaintiff's house was situate: and whereas the defendants, afterwards, to wit, on the 1st of May, 1833, and on divers other days and times between that day and the commencement of this suit, pulled down their said eight houses, and erected, on the site of the said first mentioned house, another house, adjoining to the said house of the plaintiff; yet the defendants, contriving and intending to injure the plaintiff in this behalf, wrongfully, wilfully, and injuriously, and without any reasonable or probable cause, delayed and retarded the pulling down of the said eight houses, and the re-building of their said first mentioned house, for an unreasonably long time, to wit, three years after they so erected the said hoarding, and on that account wrongfully, wilfully, and injuriously, kept and continued the said hoarding so erected and placed as aforesaid, and so obstructing the said footway, and the approach to the said plaintiff's said house as aforesaid, for a long and

agents and workmen in that behalf, behaved and conducted themselves so carelessly, negligently, and improperly, in pulling down the said first mentioned house of the defendants, &c., that by and through the carelessness, &c., of the said defendants, &c., and in neglecting to use reasonable and proper precaution in that behalf, divers large quantities of bricks, tiles, mortar, wood, dust, and rubbish, fell from the last mentioned house into and upon divers parts of the said house of the plaintiff, and upon and through divers skylights and windows, to wit, two skylights and two windows of the plaintiff, into a room of the plaintiff, part and parcel of the said messuage or dwelling-house, and used by the plaintiff as a counting-house and warehouse, and thereby broke divers, to wit, twenty panes of glass, of the plaintiff, of and belonging, &c., of great value, &c.; and thereby also divers goods, to wit, &c., which were then in the same room, so used, &c., and of great value, &c., were greatly spoiled, damaged, and destroyed: and also, by reason of the premises, divers large quantities of rain-water, on the several days and times aforesaid, penetrated and flowed into all the rooms and apartments of the said messuage or dwelling house respectively, and by reason thereof divers other goods of the plaintiff, to wit, &c., there being in the said rooms and apartments respectively, and of great value, &c., were greatly spoiled, damaged, and destroyed; and thereby, also, the plaintiff and his family were greatly incommoded and annoyed in the enjoyment and habitation of his said house, and the plaintiff was thereby also greatly disturbed and annoyed in his said business, and was greatly impeded and hindered from carrying on the same in his said house: and the defendants further contriving, &c., to wit, on, &c., by their agents and workmen in that behalf, behaved and conducted themselves so carelessly, negligently, and improperly, in and about digging and clearing the ground for the foundation of the said house so built on the site of their first men-

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tioned house as aforesaid, and in and about underpinning the party wall between that house and the said house of the plaintiff, and in and about removing a certain part of the said party wall, and in shoring up the said party wall, and in doing other works to the said party wall, and connected therewith, that by and through the carelessness, negligence, and unskilfulness, of the defendants, and their agents and workmen, in the premises last aforesaid, the said party wall, and all the walls, floors, beams, ceilings, roofs, and other parts of the said house of the plaintiff, &c., greatly sank, cracked, and gave way, and were greatly weakened and injured, and the said house of the plaintiff was thereby greatly damaged and lessened in value, and put in danger of falling, and rendered unsafe for habitation. And by reason of the premises, the plaintiff was forced and obliged to, and necessarily did, to wit, on the 22nd of October, 1834, cause the said messuage or dwelling-house to be surveyed, shored up, and propped, and amended and repaired in divers parts thereof, both inside and outside, and in so doing was necessarily put to great expense of his monies, in the whole amounting to a large sum, to wit, 500*l*. And the plaintiff, by reason of the premises, and by reason of his said house being by, and by means of, the premises, rendered unsafe for habitation, was forced and obliged to remove himself, and his family and servants, and

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way, so as to enclose or obstruct the same such hoarding in such manner, and of such dimensions, and for such time or times as he or they have been so authorized, &c., to do, by the said Lord Mayor, &c., except so far as such custom, power, or authority hath been affected by the statute made and passed in the 57 Geo. 3, intituled, "An Act for better paving and improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein;" and the said defendants further say, that they, the said defendants, having occasion to pull down the said houses in the declaration mentioned, and to erect another house on the site of the said house of the defendants, in the declaration first mentioned, the whole of such houses and sites thereof, and of the said footway in the said declaration mentioned, being then within the city of London, and the said houses and sites thereof being near to the said public footway in the said declaration mentioned, and the said defendants then also having occasion for that purpose to erect, place, and continue in such a manner, as thereby to enclose and obstruct a part of the said footway, heretofore and before the erection and placing of the said hoarding, &c., and before any of the said times when, &c., to wit, on the 1st of March, 1833, applied to one Sir Peter Laurie, Knight, then being the Lord Mayor for the time being of the said city, for his permission,

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at the said times, when, &c., of their own wrong, and without the residue of the cause by the defendants, in the same plea alleged, committed the said several grievances, &c.

To the third plea, traversing the allegations contained in it. Issue.

The cause went down to trial before *Tindal*, C. J., at the sittings after Trinity Term, 1839, when a verdict was taken for the plaintiff, by consent, for 2000*l.*, as it appeared from the order of reference drawn up, "subject to the award, order, arbitrament, final end and determination" of a legal arbitrator, who was authorized to direct that a non-suit should be entered, or a verdict for the plaintiff or defendants as he should think fit, and who was directed "at the request of either party to state any point of law upon the face of his award, for the opinion of this Court." The costs of suit were ordered to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator. The order of reference was made a rule of Court, and pending the reference, the arbitrator was requested by the defendants to raise the following points of law for the opinion of the Court.

First, whether the defendants wrongfully and injuriously and without any reasonable or probable cause, delaying and retarding the pulling down of the eight houses, and the rebuilding of the first mentioned house for an unrea-

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Secondly, with reference to the second, third and fourth points to raise the point, whether, if the custom is bad, the plaintiff is not entitled to judgment non obstante veredicto, in case the arbitrator finds the issue on the license, &c., for the defendants; also, to assess the damages by reason of the continuance of the hoarding, separately, and to set forth Sir Peter Laurie's license, including the license of the Surveyor of Pavements, so as to raise the point of law, whether the latter was a compliance with the condition on which the former was granted, and to state the fact that the hoard complained of was erected and continued for the purpose of pulling down the houses.

Thirdly, with reference to the fifth and sixth points, to state the fact, whether or not the plaintiff's house was an ancient house, and whether it had not always been supported at the east end thereof by the party wall in question, and whether or not the sinking, &c. of the plaintiff's house was not occasioned by reason of defective underpinning on the part of those employed by the defendants, and also to state the fact, whether or not the party wall was certified to be a sound wall, and of proper thickness under the Building Act, and whether or not the defendants did not underpin the wall in some parts all through, comprising that part of the wall which belonged to the plaintiff's house; and to raise the point of law, whether if the de-

last issue, namely, the plea of accord and satisfaction in regard to breaking the glass, if he should be of opinion that that issue should be found for the defendants, to state the facts, whether or not the plaintiff did not sustain damage as alleged in the declaration, by reason of the breaking of the glass beyond the mere cost of repairing the glass, and whether or not there was any evidence of the plaintiff's acceptance of the repair of the glass by the defendants in satisfaction of all the damages sustained by the plaintiff, by reason of the breaking thereof.

On the 20th of October, 1841, the arbitrator, after having set out the order of reference, made his award in the following terms: "As to the first issue joined between the parties, I award and find that the defendants (except as to the alleged careless, negligent and improper conduct of the defendants in shoring up the party wall between the house of the defendants in the declaration first mentioned, and the house of the plaintiff) are guilty of the premises in the declaration contained, and I do assess the damages sustained by the plaintiff by reason of the keeping and continuing of the hoarding so erected and placed as in the said declaration is mentioned, and so obstructing the said footway and the approach to the plaintiff's house at the sum of 100*l.*, in respect of the space of time mentioned in the license of Sir Peter Laurie in the second plea of the defendants mentioned, parcel of the time in the said declaration in that behalf mentioned, and at the sum of 50*l.* in respect of the residue of the said times in the said declaration in that behalf mentioned; and I assess the damages sustained by the plaintiff by reason of the delaying and retarding of the pulling down and the rebuilding of the said houses, &c. otherwise than by the keeping and continuing of the said hoarding at the sum of 100*l.*; and I do assess the damages sustained by the plaintiff by reason of the carelessness, negligence and improper conduct of the defendants, their agents, &c., in that behalf, in pulling down the house of the defendants, &c., and in neg-

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lecting to use reasonable and proper precaution in that behalf at the sum of 500*l*.; and I do assess the damages sustained by the plaintiff by reason of the carelessness, negligence and unskilfulness of the defendants, &c., in and about digging and clearing the ground for the foundation of the house so built, &c., and in and about underpinning the party wall between that house and the house of the plaintiff, and in and about removing a certain part of the said party wall, and in doing other works to the said party wall, and connected therewith, at the sum of 200*l*.; and as to so much of the premises in the said declaration contained, as relates to the alleged careless, negligent and improper conduct of the said defendants in shoring up the said party wall between the house of the defendants, &c. and the said house of the plaintiff, I award and find that the defendants are not guilty thereof."

The arbitrator then went on to find the facts upon the second issue; and he found that the defendants having occasion to pull down the houses in the declaration mentioned, and to erect another house on the site thereof, the whole of such houses and the sites thereof being in the city of London, and near to the footway in the declaration mentioned, and the defendants also having occasion for that purpose to erect a hoarding in such manner as thereby to enclose and obstruct a part of the said footway, before

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obtain the leave and license of Richard Kelsey, who was then the surveyor of the pavements of the city of London, &c., under his hand, to erect and continue such hoardings of such dimensions and in such manner, and to continue the same for the said space of time, so authorized by the said Lord Mayor as aforesaid; that the defendants having obtained such licenses as aforesaid, did, on the 1st of April, 1833, erect and place certain hoardings for such purposes as aforesaid, of the dimensions and in manner so authorized by the said licenses, and did thereby and therewith enclose and obstruct the said part of the said footway, &c., and did, for the purpose aforesaid, keep and continue the said hoardings so erected, &c., for the said space of time in the said licenses mentioned.

As to the third issue, the arbitrator found that the defendants did not cause or procure the said panes of glass so broken, &c. to be replaced with new panes of glass, &c., in full satisfaction, &c., and that the plaintiff did not agree to accept and receive the replacing of the said panes of glass in full satisfaction and discharge of the damages in the third plea mentioned.

Having then certified that this was a proper cause to be tried before a Judge of a superior Court, and having directed the costs of the reference to be paid by the defendants, he proceeded to state the following matters for the opinion of the Court.

He stated, that the hoarding in the declaration mentioned was erected by the defendants in front of their house, preparatory to their pulling down their said house, in such a manner that the hoarding enclosed a part of the public footway in the street running in front of the houses of the plaintiff and defendants, and thereby in part obstructed the footway and the approach to the house of the plaintiff, and the passage of persons passing and re-passing on foot, on the side of the street on which the plaintiff's house stood, and that after the houses of the defendants had been pulled down, the defendants took

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down the hoarding, and removed the same to a distance of five feet, and there erected and placed the same in front of the site of the said last-mentioned houses, and adjoining the said house of the plaintiff, in such a manner that the hoarding no longer enclosed any part of the said public footway; and that afterwards, preparatory to their building another house on the site of the house pulled down, they again removed the said hoarding, and re-erected the same in such a manner as is above described, and thereby again in part obstructed the said footway, &c. He further stated, that the custom set out in the second plea of the defendants was admitted by the replication to that plea, the plaintiff having only traversed the residuum causæ as therein set forth; and if the Court should be of opinion that the second plea of the defendants' setting up, and justifying under the said custom is not sufficient to bar the plaintiff from recovering his damages in respect of the grievances confessed by the said second plea, then so far as he had power and authority to do, he directed that judgment should be entered for the plaintiff for such grievances, notwithstanding the finding of the said second issue for the defendants.

He stated, that the license granted by Sir P. Laurie, including the license of the surveyor of the pavements, as given in evidence before him by the defendants, was as

from the date hereof, provided that the said Mr. Long shall also obtain the license of the surveyor of the pavements appointed under and by virtue of an act of Parliament, &c. (57 Geo. 3, c. 29). Given under my hand and seal, this 25th day of June, 1833: P. Laurie, Mayor." The license of the surveyor of the pavements was as follows: "I do hereby give leave and license to the above named — Long, to erect and continue four boards in manner and for the time above mentioned." Signed "Richard Kelsey, Surveyor of Pavements Office, Guildhall."

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The arbitrator directed, that if the Court should be of opinion that the license so given in evidence did not support the allegation of license contained in the said second plea, or is not a justification of the matters in the introductory part of that plea mentioned, then, instead of the above finding for the defendants upon the said second issue, he awarded and found that the defendants, of their own wrong, and without the said residue of the said cause, committed the grievances in the introductory part of the said second plea mentioned, and thereby confessed.

And he further stated, that the carelessness, &c. of the defendants, &c. in and about the underpinning of the said party wall, consisted in their underpinning the said party wall partially, and not underpinning the whole of the said wall, whereby the plaintiff's house sank and sustained damage. He further stated, that the house of the plaintiff was an ancient house, and had been, and was entitled to be, supported at the east end thereof by the said party wall; and that the said party wall was duly certified to be a sound party wall, and of proper thickness, under the Building Act, shortly before, and with reference to the taking down of the same.

In Michaelmas Term (5th November) a rule was obtained on behalf of the plaintiff, calling upon the defendants to shew cause why judgment should not be entered up for the plaintiff upon the second issue, non obstante, with 150*l*.

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damages; or why the verdict should not be entered for the plaintiff upon that issue, with 150*l.* damages, upon the ground that the custom set out in the second plea was not good in point of law, and that the licenses set out in the award did not support the defendants' plea; or why, in case the Court should be of opinion that judgment should be entered for the defendants on that part of the declaration professed to be justified by the second plea, the judgment should not be entered for the plaintiff on the general issue for the 50*l.* awarded in respect of the continuance of the hoarding beyond the time covered by the licenses, on the ground that such continuance was not justified by the licenses.

Upon the same day a rule was also obtained by the defendants, calling upon the plaintiffs to shew cause why the award should not be set aside on the following twenty-six grounds:

First, that the arbitrator had not thereby directed how the verdict should be entered up, or whether the plaintiff was entitled to recover the whole or any, and what portion or portions of the damages assessed by the award.

Secondly, because the arbitrator had not awarded whether judgment should be given or entered up for the plaintiff, for the whole or any, and what portion or portions of the damages assessed by the award, or upon any, and which of

bar to the plaintiff's recovery of the sum of 50*l.* mentioned in the award, and assessed as damages, as well as the sum of 100*l.* in the award first mentioned.

Fourthly, because the arbitrator had not determined as to the validity of the second plea, independently of the question as to the validity or invalidity of the custom set forth therein, as he ought to have done, but has, without being requested so to do by either of the parties, raised as a question for the Court, the validity or invalidity of that plea generally.

Fifthly, because the arbitrator had not determined or directed, whether in the event of the Court being of opinion that the second plea of the defendants was not sufficient to bar the plaintiff from recovering his damages in respect of the grievances confessed by the second plea, judgment was to be entered for the plaintiff, notwithstanding the finding of the said second issue for the defendants for the sum of 100*l.* in the award first mentioned only, or for that sum, and also for the sum of 50*l.* in the award also mentioned, and thereby assessed as damages.

Sixthly, because the arbitrator had not determined by his award, whether in the event of the Court being of opinion that the custom set out in the second plea was a good custom, the plaintiff was to recover the sum of 50*l.* in the award secondly mentioned, or to have judgment for the same, or whether the second plea was a bar to the plaintiff recovering the said sum of 50*l.*, as well as the sum of 100*l.* in the award first mentioned, the plaintiff not having new assigned.

Seventhly, because the arbitrator has not determined, whether in the event of the Court being of opinion that the license given in evidence does not support the allegation of license in the second plea, or is not a justification of the matters in the introductory part of that plea, judgment is to be given for the plaintiff for the sum of 100*l.* only, or for that sum, and also the sum of 50*l.*

Eighthly, because the arbitrator has not determined

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whether the plaintiff is to recover or have judgment for the sum of 50*L.*, in the event of the Court deciding that the second plea is good.

Ninthly, because the arbitrator has not directed whether a verdict is to be entered up for the plaintiff for the sum of 100*L.* assessed by the award, as the damages sustained by him, by reason of the delaying and retarding of the pulling down and rebuilding of the houses of the defendants, otherwise than by the keeping and continuing the said hoarding, and because he has not awarded whether judgment is to be given for the plaintiff for such last mentioned damages, or whether the judgment is to be arrested in respect of so much of the declaration as relates to the delaying and retarding of the pulling down and rebuilding of the said houses, otherwise than by keeping and continuing the said hoarding.

Tenthly, because if the Court shall be of opinion that the award does substantially direct a verdict and judgment to be entered up for the plaintiff for such last mentioned damages, the award is bad for giving damages for that which is not a legal or any cause of action.

Eleventhly, because the arbitrator has not stated, or raised by or on the face of his award, the point of law, whether the defendants, wrongfully and injuriously, and without any reasonable and probable cause delaying and

pulling down the house of the defendants in the declaration mentioned, and because it cannot be ascertained from the award how much of that sum of 500*l.* is assessed in respect of such last mentioned neglect of the defendants.

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Fourteenthly, because it is uncertain, upon the facts stated by the arbitrator upon the said award, whether the plaintiff is entitled to recover the sum of 100*l.* in the award first mentioned, and the sum of 50*l.* therein mentioned, or either of those sums.

Fifteenthly, because the facts stated by the arbitrator on the face of his award, are not sufficient to enable the Court to decide the points of law thereby intended to be raised, or the several points of law, which he was requested on behalf of the defendants to raise by his award.

Sixteenthly, because the award is inconsistent in directing that if the Court shall be of opinion that the second plea is not sufficient to bar the plaintiff from recovering his damages in respect of the grievances confessed by the said plea, judgment shall be entered for the plaintiff for such grievances, notwithstanding the finding of the second issue for the defendants, and also finding, that if the Court shall be of opinion that the license so given in evidence, as set out in the award, is not a justification of the matters in the introductory part of that plea mentioned, the defendants, of their own wrong, and without the residue of the said cause, committed the grievances in the introductory part of the second plea mentioned.

Seventeenthly, because the arbitrator has, by his award, directed, that if the Court shall be of opinion that the license given in evidence is not a justification of the matters in the introductory part of the second plea mentioned, the defendants, of their own wrong, &c., committed the grievances, &c.

Eighteenthly, because the arbitrator ought himself to have determined by his award, whether the custom set out in the second plea was a valid custom or not; and also whether the second plea was a good, or an insufficient plea,


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so as to have enabled the parties to act upon his award, without taking the opinion of the Court, the arbitrator having been requested to raise the question, whether the question so set out was a bad custom, only in the event of his finding and considering it so himself.

Nineteenthly, because the arbitrator has not stated or raised upon the face of his award the points of law thirdly, fifthly, and sixthly mentioned in the defendants' points; and because he has not found or stated upon his award sufficient facts to enable the Court to determine whether the plaintiff is entitled to recover both or either, and which of the said sums, by the said award assessed as damages, for keeping and continuing the hoarding in the declaration mentioned.

Twentiethly, because the matters and facts stated by the arbitrator on the face of his award, and which, by his award, he has alleged that he has stated at the request of the respective parties, for the opinion of the Court, are not sufficient to enable the Court to form any opinion, or to give any judgment thereon.

Twenty-firstly, because the arbitrator has not stated in his award upon what points of law the Court is to give their opinion with respect to the facts and matters thereby stated, or what points of law he has stated or raised for the opinion of the Court, or referred to them for their decision.



Twenty-thirdly, because the arbitrator has not by his award raised the points which, on the part of the plaintiff he was requested to raise, whereby the award is not binding on the plaintiff, and therefore not mutual.

Twenty-fourthly, because the arbitrator has not by his award determined the cause referred to him, or made his award, concerning all the matters referred to him, and because it is impossible from the said award to ascertain how the costs of the suit, which are to abide the event of the said award, are to be taxed, or what costs of suit the plaintiff is entitled to recover.

Twenty-fifthly, because the award is not final, but imposes on the parties, or one of them, the necessity of applying to, and taking the opinion of, the Court, before the award can be acted upon, whereas the said arbitrator ought to have made a final award, so that the parties might have acted upon the same, without being forced to apply to the Court, and should have raised upon the face of his award such points, and such points only, as he was requested to raise by the respective parties in the events mentioned by them, so that they, or either of them, might have taken the opinion of the Court upon those points, if they, or either of them, had thought fit to do so.

Twenty-sixthly, because the award is not final, certain, or mutually binding; because it raises points for the opinion of the Court which the arbitrator was not requested by either party to raise, or state on the face of his award, and omits to raise or state other points which the arbitrator was requested to state and raise upon the face of his award; and because those points of law which are thereby raised are raised in such a manner, that it is impossible for the Court to form any opinion thereon, or to decide the same.

In Easter Term,

Channell, Serj., and *Addison* shewed cause against the rule obtained on behalf of the defendants for setting aside the award. The main objection intended to be raised to

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the award was, that it was not final between the parties, because, although it assessed damages upon the various issues, it did not make a final end and determination of the cause within the terms of the rule of reference, by directing the particular judgment to be entered in the suit. Undoubtedly if this were a case of a general reference to arbitration, and the rule of reference contained the terms here introduced, it would be requisite that the award should conclude all disputes between the parties, and that each matter involved in the cause should be finally settled. In the present instance, however, the arbitrator was authorized to state questions for the opinion of the Court at the request of either party, and that request having been made, all that was required of him was to leave the case in such a position that the Court should be able, upon their decision upon the matters raised, to give a conclusive judgment founded upon the opinion of the arbitrator. The arbitrator here had assessed damages upon every contingency which could arise, and the parties having entered into terms by which they consented for their mutual advantage that a certain arrangement should be made, the necessary consequence of which was that which had arisen, the defendants could not now turn round to resist that consequence. The effect of the order of reference was to place the arbitrator in the position of a jury, and (questions of law having arisen which

plaintiff was entitled to recover. There it was alleged and proved that the defendant so negligently, unskilfully and improperly dug his own soil that the plaintiff's house was thereby injured, and it was held that there was a good cause of action. The twenty-second objection was that the arbitrator had not found whether the party wall between the houses of the plaintiff and defendants belonging wholly to the plaintiff or the defendants, or partly to one and partly to the others, or whether it belonged to them as tenants in common. The point, however, was immaterial, and was not raised before the arbitrator. The arguments upon the remaining objections were of a nature which renders it unnecessary to report them.

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Peacock, in support of the rule. First, the arbitrator was bound to make an award which was good in itself, without the intervention of the Court at all. *Barton v. Ranson* (a), *Anderson v. Fuller* (b). Here, however, he had given no direction with regard to the mode in which the judgment should be entered, but had delegated his power in this respect to the Court (c). Secondly, with regard to the thirteenth objection, the declaration disclosed no sufficient cause of action. The arbitrator had given damages for a want of precaution in the defendants in pulling down their house, but this was not a matter in respect of which the plaintiff was entitled to recover damages. *Chadwick v. Trower* (d).

On a subsequent day

Peacock shewed cause against the rule obtained on behalf of the plaintiff. The questions to be raised upon this rule were, first, whether the custom set up in the plea was a good custom; secondly, whether the plea afforded a suffi-

(a) 3 M. & W. 322.

vol. 9, p. 437, O. S.; 2 Scott,

(b) 4 M. & W. 470; *Ante*, vol. N. R. 509.

7, p. 51, O. S.

(d) 6 Bing. N. C. 1.

(a) Vide *Little v. Newton*, *Ante*,

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cient answer to the declaration; and thirdly, whether the allegations in the plea were supported by the licenses which had been given in evidence. First, the custom was a good and reasonable custom. It would be argued that there was nothing by which the reasonableness of the length of time for which the hoarding was to be continued could be determined, for that the decision of that question was left to the Lord Mayor. There must be some tribunal, however, in which the decision of such a point must be vested, for a custom authorizing a hoard to be erected for a certain period only, the same period being allowed in all cases alike, would be useless and absurd. Then to whom should such a question be referred. By the charter of Charles I. the soil of the streets was vested in the corporation (*a*), and in that charter a recital was made of a previous charter of the 26th of October in the 23rd Hen. 6, which contained a similar provision. And it was reasonable that this should be so arranged, because, when the soil of the streets was originally dedicated to the public by the proprietor, it was only fit that the right to stop up the highway for the purposes of repairs, or of pulling down or rebuilding houses, should be deemed to have been reserved. Nor was this a reservation tending only to private advantage, but which was necessary for the public safety and convenience. The Lord Mayor was a fit authority, in whom the discretionary

Nu. 37. (*Vide Com. Dig.* tit. "*London*." (M.)), the citizens of London shall enjoy all their liberties whatsoever, licet usi non fuerunt vel abusi, and notwithstanding any statute to the contrary, and unless it could be shewn that the custom here set up was repugnant to the law it might well exist. Then, secondly, did the plea afford a sufficient answer to the declaration? The declaration alleged that the defendants "wrongfully, wilfully and injuriously kept and continued the said hoarding so erected, &c. for a long and unreasonable time, to wit, three years," &c.; and it would be contended on behalf of the plaintiff, that if the time was unreasonable for which the hoard was continued, the defendants could not justify under the license, for the license could not authorize the continuance of the hoarding for any but a reasonable time. For the purposes of this declaration, however, the unreasonable length of time during which the hoard was continued was immaterial. The charge which formed the gist of the declaration was the erection and not the continuance of the hoard, but the erection was justified by the custom and by the license. There was no replication claiming further damage in respect of the continuance of the hoard. *Bonafous v. Walker* (a), *Tebbutt v. Selby* (b), and *Frankum v. Earl Falmouth* (c), were cited. Thirdly, supposing the plea to be good in point of law, was it proved in fact? That depended on the licenses given in evidence. The license of the Lord Mayor authorized the erection of "a hoard;" that of the surveyor of the pavement authorized the erection of "four hoards;" the plea justified the erection of a "hoarding." The arbitrator had awarded in favor of the defendants, and it was submitted that this decision was correct, for that there could be no doubt that the terms employed were identical. In fact, but one hoard had been erected, which exceeded the ordinary limits of a single

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(a) 2 T. R. 126.

(c) 2 Ad. & El. 452.

(b) 6 Ad. & El. 786.

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hoard, for which reason the surveyor of pavements, who received a fee on each hoard, had granted a license for four. These questions involved further points with regard to the damages to which the plaintiff would be entitled under the award. Fourthly, supposing the plea to be bad, the plaintiff would be entitled to judgment for 100*l.* only, assessed as the damage occasioned by the erection of the hoard, under the license of the Lord Mayor. If the unreasonableness of the length of time for which the hoard was continued was immaterial, the defendants had only to justify the erection of the hoard; they did so, and proved their justification by the production of the Lord Mayor's license, and they could not be deemed liable for any damage which accrued beyond that arising from the mere erection. In that respect, 100*l.* only were assessed as damages, and the 50*l.* assessed as damages for the maintenance of the hoard, otherwise than under that license, could not be given to the plaintiff, because, in fact, he did not claim such in his declaration, or by new assigning and alleging damages *ultra*. So, fifthly, supposing the plea to be held to be good, but not to be proved, the same argument would apply, for it was for the erection of the hoard, and not its maintenance, that the plaintiff claimed damage.

joining," and the Court was left to decide the meaning of the indefinite expression, "near to." That was an expression, however, which, to be rendered intelligible, ought to be qualified by some words shewing the act to be done to be necessary for the public safety. The authority of the Lord Mayor was stated to be, to grant licenses for the enclosure of the "public footway," but this was quite unconnected with the previous allegation. But, further, the Lord Mayor was alleged to have the sole and exclusive jurisdiction in such a case, and to have the sole power of judging of the time, place, and manner of the erection, without any restriction as to the reasonableness of the proceeding to be taken. His power was not stated to arise upon any notice being given to parties interested, but although the Lord Mayor might be taken to be placed in some degree in the position of the owners of the soil, that arrangement could not prevail in opposition to the public rights. The custom alleged was, therefore, unreasonable and bad. Thirdly, the plea was not proved. For, waiving the point which had been argued on behalf of the defendants, there was nothing to shew that the license of the surveyor of the pavements referred to the same hoarding as that of the Lord Mayor, which was a necessary ingredient in the evidence, to support the plea of justification. With regard to the amount of damage, whether the second plea was proved or not, the plaintiff would still be entitled to the whole 150*l.* in respect of the erection and continuance of the hoarding, because there was damage alleged beyond that which was justified, namely, in respect of the maintenance of the hoard, and the assessment must be taken to have been made under the general issue.

Cur. adv. vult.

TINDAL, C. J., in Trinity Term, delivered judgment. This case has been brought before the Court upon two

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cross motions; one rule obtained by the plaintiff, calling on the defendants to shew cause why judgment should not be entered for the plaintiff on the matter stated in the declaration, and proposed to be covered by the second plea, non obstante veredicto, with 150*l.* damages, or why the judgment should not be entered for the plaintiff on the general issue for the sum of 50*l.*, awarded in respect of the continuance of the hoarding mentioned in the declaration; the other rule obtained by the defendants, and which calls upon the plaintiff to shew cause why the award made in this cause, under an order of nisi prius, should not be set aside, upon various objections, twenty-six in number, which have been urged against the validity of the award. And we think it will be most convenient to consider, in the first instance, the validity of the award, and afterwards, the plaintiff's rule for judgment non obstante veredicto. With respect to the first objection taken to this award, that the arbitrator was bound to decide as to the amount of damages to be recovered, and to direct how the judgment should be entered up; it appears to us that the arbitrator, upon the proper construction of the order of reference, was not bound to come to such decision, or to give such direction. He has, by his award, disposed of all the issues joined on the record, and has assessed damages separately, in respect of each subject-matter of complaint stated in the declara-

The case of *Anderson v. Fuller* (a) was cited, to shew that an arbitrator cannot, without special leave, state a case for the opinion of the Court, but here, by the order of nisi prius, and by the parties themselves, he was required so to do. The first objection, therefore, fails, and the same answer may be given to the second and third, viz., that the arbitrator has fully discharged his duty, by finding the issues, assessing the damages separately, and stating, for the opinion of the Court, such points as the parties required, and that he would not make any final award upon those points. The fourth objection is, that the arbitrator has not determined as to the validity of the second plea, independently of the question of the validity or invalidity of the custom therein set forth, as he ought to have done; but has, without being requested so to do by either of the parties, raised, as a question for the Court, the validity or invalidity of that plea generally. But this objection does not appear to be founded in fact. The arbitrator was requested, by the plaintiff and defendants, to raise a question as to the validity of the custom, and by the former, to raise a question as to the sufficiency of the evidence to prove residuum causæ, and he does not appear to have raised any other question respecting it. But, even if it could be shewn that he has, inasmuch as he has, in the first instance, found the issue on that plea generally for the defendants, the matter afterwards stated may be rejected as surplusage. *Barton v. Ranson* (b); *In re Wright and Cromford Canal Company* (c). It is a sufficient answer to the fifth objection, that the arbitrator has assessed the damages separately, as required by the plaintiff, so that the Court may direct what shall be the effect of their decision as to the custom; and the same answer may be given to the sixth, seventh, and eighth objections. The ninth objection is, that the arbitrator has not decided certain points therein mentioned, but he has, by assessing the damages separately, submitted

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(a) 4 M. & W. 470.

(c) 1 Q. B. 98.

(b) 3 M. & W. 322.

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all those points to the Court, as the defendants themselves required him to do. As to the tenth objection, it was conceded, during the argument, that the plaintiff could not recover any damages for the delay in pulling down the houses, independently of the fact of keeping up the hoarding. But the point was raised at the request of the parties, and the validity of the award is not affected by it. The eleventh and twelfth objections are not founded in fact. The arbitrator *has* raised the questions referred to in those objections. The thirteenth objection was founded on the supposed resemblance of this case to that of *Chadwick v. Trower (a)*; but, upon examination it will be found to be essentially different. The declaration, in that case, contained two counts; and general damages were given upon both. A writ of error was brought, and it was contended for the plaintiff in error that the second count could not be supported. It alleged that the plaintiff was possessed of a vault, with wine in it: that the defendant was about to pull down the adjoining vaults and walls, and that it was the duty of the defendant, in the event of his not shoring up the walls, to give notice to the plaintiff of his intention to pull them down; and also that it was his duty to use due care and skill, and to take due, and reasonable and proper precautions, about the pulling down his vaults and walls, so that for the want of such precautions, the plaintiff

defendant the duty of taking precaution against injuring it, by pulling down his own wall. The declaration in this case is very different. It charges the defendants with conducting themselves so carelessly, negligently, and improperly, in pulling down their house, that by and through their carelessness, negligence, and improper conduct in pulling down their house, and in neglecting to use proper precaution in that behalf, large quantities of bricks, mortar, &c. fell from the defendants' house into and upon the plaintiff's house, broke the windows, skylights, &c., and occasioned great consequential damage; the plaintiff therefore complains, not of some mere omission on the part of the defendants, but of their doing certain acts in so negligent a manner, that by those very acts the plaintiff's house was injured. The present case, therefore, is very like that of *Dodd v. Holme* (a), and the arbitrator was warranted in giving damages in respect of this part of the declaration. The fourteenth objection is only a repetition of the fifth in a different form. The fifteenth is too general. The sixteenth objection is founded upon a supposed inconsistency in the award; but there is not any such inconsistency. The semblance of it arises from the arbitrator's compliance with the request of the parties, that he would submit to the judgment of the Court the validity of the second plea, and also the sufficiency of the evidence to maintain the issue taken upon it. No attempt was made to support the seventeenth objection, which indeed appears wholly unfounded. The eighteenth objection is, that the arbitrator ought to have determined whether the custom set up in the second plea was good or bad, but he could not do so, as the plaintiff required him to raise the question on his award if he thought it good, and the defendants if he thought it bad. The nineteenth objection is, that the arbitrator did not raise in his award the third, fifth, and sixth points which the defendants desired to have raised.

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(a) 1 Ad. & El. 493.

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But the third would have been useless, as no damages are given in respect of the matter to which it refers; the fifth is in fact raised, and the sixth was determined in favour of the defendants, by the arbitrator's finding that part of the plea of not guilty in their favour. The twentieth objection is too general. The twenty-first also is too general. If the defendants had reason to complain that some specific point which they wished to have raised was not raised, they should have specified it. The twenty-second objection is, that the arbitrator has not found or stated in, or by his award, how long the hoarding erected by the defendants in front of their houses, preparatory to pulling down the same, remained, before the same was removed, so as no longer to enclose any part of the said public footway, as mentioned in the award, or how long it remained in the state last mentioned before it was again removed and erected as in the award mentioned, or how long it enclosed a part of the said footway, or in part obstructed the same. But the arbitrator does not appear to have given any damages in respect of the re-erection of the hoarding, and it was therefore unnecessary to raise this point. The twenty-second objection then complains that the arbitrator has not found or stated "whether the party wall mentioned in the award belonged wholly to the plaintiff or to the defendants, or partly to one and partly to the others."

of the plaintiff's house was occasioned by the defective underpinning on the part of those employed by the defendants." As to this part of the case, the arbitrator has stated that "the carelessness, negligence, and unskilfulness of the defendants, their agents and workmen, in and about the underpinning of the said party-wall, consisted in their underpinning the said party-wall partially, and not underpinning the whole of the said wall, whereby the plaintiff's house sunk and sustained damage." Both parties appear to have assumed before the arbitrator, that the party-wall belonged one-half to the plaintiff, and the other half to the defendants, and he was not required to state any question for the opinion of the Court upon that point. He has, according to the request of the parties, raised a question as to the liability of the defendants in respect of injury arising from their underpinning only their own half of the party-wall, by stating that "the negligence, &c., for which he has given damages, consisted in underpinning the party-wall partially, and not underpinning the whole of it:" and construing that most favourably for the defendants, it may be considered to be a statement that the negligence consisted in underpinning their own half of the party-wall only. Now, there is not amongst the numerous objections taken to this award, any one distinctly complaining of that assessment of damages. Assuming, however, that the point is raised for the consideration of the Court, we are of opinion that the defendants had no right to underpin the party-wall either partially or wholly, unless that could be done without injury to the plaintiff's house. It may indeed be doubtful whether the plaintiff had a several interest in that half of the wall which was next to his house, or whether he and the defendants were tenants in common of the whole; but in either event, an action on the case was maintainable against the defendants in respect of the injury which resulted from his mode of dealing with it. (See *Com. Dig.* tit. "*Estates*," (K 8,) *Cubitt v.*

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Porter), (a). The twenty-third, twenty-fourth, and twenty-sixth objections are too general; and the twenty-fifth cannot be sustained, for it has been already shewn, that the arbitrator was not bound to make a final award, but had authority, and was bound, to state a case for the opinion of the Court. The award, therefore, cannot be set aside, and the defendants' rule obtained for that purpose must be discharged. The rule obtained by the plaintiff for judgment, non obstante veredicto, remains to be considered. Two grounds have been stated for that motion. First, that the custom set out in the second plea is bad in law; secondly, that the licenses stated by the arbitrator to have been proved before him did not support the plea. It was argued that the custom was unreasonable, because the power alleged to be vested in the Lord Mayor is not merely to give a license to obstruct by a hoarding any part of a public way *next adjoining* or *near* to any house which the party may be about to pull down or erect, but to license the obstruction of *any part of any public way* within the city of London. But upon an examination of the language of the plea, it will be found that the power is not quite so large. It runs thus:—"That from time whereof, &c., until, and at the time, &c., there has been, and is, and from thence hitherto hath been, and still is, within the city of London, a certain ancient and laudable custom, there used and approved of

mission, license, or authority, to erect, place, and continue such hoarding in such manner and for such purposes aforesaid, such Lord Mayor, &c., hath, and during all the time aforesaid had full and free power and authority to authorize, license, and permit, and hath lawfully authorized, licensed, and permitted, and been used and accustomed to license, authorize, and permit such person or persons, &c., to erect, place, and continue any such hoarding, for such purpose or purposes aforesaid, of such dimensions, and in such manner, and for such time or times, as he hath thought reasonable or proper for such purpose or purposes, and the person or persons, &c., so applying as aforesaid, and having obtained such permission, &c., hath and have, during all the time aforesaid, lawfully and of right erected, &c., and been used and accustomed of right to erect, &c., for such purpose, &c., in any such public way, so as to enclose or obstruct the same, such hoarding, in such manner, and of such dimensions, and for such time or times as he or they have been so authorized, &c., to do, by the said Lord Mayor, &c." It is, therefore, confined to the erection of a hoarding, which the party applying for the license has occasion to erect, so as to obstruct part of a public way, for the purpose of building or pulling down a house, and we do not discover anything unreasonable in such a custom. It is convenient that a power to grant such licenses should be vested somewhere. It is often necessary, for the safety of the public, as well as for the advantage of individuals, that houses should be taken down and rebuilt, and that cannot be done without exposing the public to much danger and annoyance, unless a hoard be erected; and surely it is not unreasonable, that a party about to undertake such a work, should be enabled to ascertain beforehand what he may do with safety, instead of incurring the peril of a verdict against him in a criminal or civil proceeding, or perhaps in both. The stat. 57 Geo. 3, c. 29, s. 75, makes it requisite, that a person about to erect a hoard, for the purpose of repairing or building houses, should obtain a license

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from the surveyor of pavements for the district. The Legislature, therefore, appears to have considered it reasonable that the surveyor should be the judge of the propriety of granting such licenses, and this confirms the opinion that an immemorial custom, giving the like authority to the Lord Mayor, is not unreasonable; especially as the soil of the streets of the city of London is vested in the Corporation, and it is possible, that, on the original dedication of the streets of the city to the public, the power in question may have been reserved to the chief magistrate. It was further urged, that the custom cannot warrant the Lord Mayor in granting a license to keep up a hoard for an unreasonable time; but if he may, by custom, have power to judge of the expediency of erecting it, we think he may also judge how long it ought to be continued. Assuming, then, the custom to be good, we think that the licenses set out on the award were sufficient to justify the finding of the arbitrator in favour of the defendants on the issue taken on the second plea. The rule for entering the judgment, non obstante veredicto, must, therefore, be discharged, and as the plea is pleaded generally to the keeping and continuing of the hoarding erected, as in the declaration mentioned, the plaintiff cannot have either the 100*l.* or the 50*l.* assessed as damages in respect of the maintenance of that hoarding:—neither can he have the 100*l.* assessed for

COURT OF EXCHEQUER.

Trinity Term.

IN THE FIFTH YEAR OF THE REIGN OF VICTORIA.

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THIS was an issue under the Interpleader Act, to try whether certain goods, which had been seized by the sheriff of Cardiganshire, under a writ of fieri facias, were the property of the plaintiff, or of one Thomas Davies, against whom that writ had issued at the suit of the defendant. At the trial before *Maule, J.*, at the last Cardigan assizes, it appeared that the plaintiff claimed the goods by virtue of a bill of sale, dated the 2nd of January, 1840, which purported to be a conveyance of them to him by Davies, as a security for the repayment of 300*l.* with interest, which was therein stated to have been advanced at different times by the plaintiff to Davies. The defendant contended that the transaction was fraudulent, and the plaintiff, in order to prove bona fides, proposed to give in evidence a former assignment to him of the same goods prepared by a scrivener, and executed by Davies on the 18th of October, 1839, as a security for the sum of 180*l.*, being a portion of the 300*l.* then advanced, on which the word "cancelled" was written. This assignment was not stamped, and its admissibility was objected to on that ground. The learned Judge refused to admit it, and a rule nisi for a new trial having been obtained, on the ground of the rejection of this evidence,

On an issue to try the property in certain goods which the plaintiff claimed under a bill of sale, a previous bill of sale of the same goods, though cancelled, is not admissible to prove bona fides, unless stamped.

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Chilton shewed cause. This is an attempt to sustain an assignment which cannot be relied on by reference to another assignment which is unstamped. It is an established rule, that a jury cannot draw a conclusion of fact from an unstamped instrument, *Sweeting v. Halse (a)*. It is argued, on the other side, that as the first assignment was cancelled, it is evidently not cited for the purpose of giving effect to it, but merely to shew what the parties meant. That however, could only be done by proper evidence. There would be danger in sanctioning the admission of such proof, which would afford to a dishonest person great facility in defeating a just claim. A party who relies upon a written instrument is bound to put it in, but he is prevented from so doing unless it be properly stamped. [Lord *Abinger*, C. B.—The assignment was put in evidence for the purpose of shewing that the parties had come to an agreement of some kind; if that agreement had been by parol, evidence might have been given of it; but as it was reduced to writing it should have been stamped.] Wherever an unstamped instrument is allowed to be received in evidence, it is upon the ground that no stamp would render it valid. Thus, in the case of a forged bill of exchange, the document is not what it purports to be, and a stamp could not render it available. So, a note given by a voter who has been bribed, for repayment of

has been ruled by *Bayley, J.*, (a), that an unstamped receipt given by the servant to the debtor who had paid him the money, was not evidence against the prisoner. So, upon an indictment for arson, with intent to defraud an insurance office. An unstamped memorandum indorsed on a policy, was on a case held inadmissible, reserved by the Judges. Lord *Tenterden*, in delivering the judgment of the Court in *Jardine v. Payne* (a), says, "We are of opinion that an unstamped bill, or one improperly stamped, cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. Such an instrument may be looked at by the Court for the purpose of seeing whether it requires a stamp or is properly stamped, that being a part of the duty of the Judges with which the jury have nothing to do, and of which they are supposed to take no cognizance. It may be looked at by the jury also for a collateral object, as was done in the case of *Gregory v. Fraser* (b), where the defence was, that the maker of a note was drunk at the time the money was advanced, and was imposed upon by the plaintiffs, and the handwriting of the note was vouched as proof of that fact." [*Alderson, B.*—What was there done was merely to see that the party was drunk. The instrument was looked at as some writing, so that the jury might say at once, "he was drunk for he staggers in his hand."] *Jardine v. Payne* is an authority expressly in point. [*Alderson, B.*—The statute says, that unless stamped the instrument "shall not be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful or available in law or equity," that means a pleading or giving in evidence by the parties to a suit, or the using it for a beneficial purpose. In criminal cases, the Crown is no party to a suit, therefore those cases are distinguishable. Can such instrument be received at all where the contents are shewn for the purpose of making evidence beneficial to the party?] It may

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(a) Stark. on Evidence, 1058.

(c) 3 Camp. 454.

(b) 1 B. & Adol. 663.

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be said that it is a great hardship on parties, but it is more so in cases of indentures of apprenticeship. [*Alderson*, B.—In *Rex v. Pendleton* (a), the Court looked at an unstamped indenture.] That was only to ascertain when the hiring and service commenced. *Sweeting v. Halse* (b), *Reed v. Deere* (c), govern this case; *Coppock v. Bower* is also in favor of the defendant.

E. V. Williams and *Nicholl*, in support of the rule. There is no distinction between the rules of evidence in civil and criminal cases. This question must be looked at as if in truth there had been a conspiracy between the plaintiff and his brother-in-law Davies, to defraud the defendant. Can it be said that upon such a charge this instrument ought to have been rejected? [*Lord Abinger*, C. B.—I apprehend it could not be received in their favor, though it might for the purpose of proving a conspiracy.] An unstamped instrument is equally admissible, whether to protect innocence or establish guilt. [*Lord Abinger*, C. B.—This case is different. Suppose the prosecutor proved fraud, aliunde, could the party charged shew a valid contract by an unstamped instrument. *Alderson*, B.—The declarations of a prisoner are evidence against him, though not for him.] Before the case of *The King v. Hawkeswood* (d), some doubt existed whether unstamped

Ellenborough would lead to that conclusion. The mode in which the question arose was probably this: the defendant naturally inquired if there was any memorandum of the loan; the plaintiff thereupon produced the unstamped note, when the defendant proposed to read it, which was objected to by the plaintiff. If this case had been an indictment for larceny, and the plaintiff wished to shew that he took those goods under a bonâ fide claim of right, could he not have given this instrument in evidence, though unstamped? Upon an indictment for conspiracy it would have been clearly admissible. *The King v. Fowle* (a). In *Keable v. Payne* (b), it is laid down by *Patteson, J.*, that there is no distinction in this respect between civil or criminal proceedings. If an unstamped instrument be admitted to establish, it necessarily follows that it may be used to repel a charge of fraud.

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LORD ABINGER, C. B.—I must own that in the early part of this case, I entertained a strong opinion upon it, and although there is no one more likely than Mr. *Williams*, from his learning and acuteness, to shake that opinion, he has wholly failed to do so. It is difficult to deny many of the abstract propositions advanced by him, but if the particular circumstances of this case are looked at, nothing can be more clear. The Stamp Act, for the sake of revenue, was made to exclude the reception in evidence of such instruments as this, unless stamped; whenever they were introduced for the purpose of making them available, that is to say, setting them up and giving effect to them. Therefore, in every case where a question arises between the parties in a cause, as to the evidence which may be given; for instance, of an agreement, which is the subject of the action, or has some collateral relation to it, the moment you ask whether it is in writing, and it turns out to be so, no other evidence than the written

(a) 4 C. & P. 592.

(b) 8 Adol. & E. 555.

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document being producible, if it proves to be unstamped, it must be rejected. So with regard to promissory notes and bills of exchange, and all matters which are the subject of the Stamp Acts, unless they are stamped when they are produced, you must reject them wherever they are produced, to shew that they have, or ever had, any validity. But the case is different when the purpose is not to give them effect, but to defeat them, and to shew that they were entered into for the purpose of fraud and conspiracy. Thus, if there were a conspiracy, and the parties intended, inter se, to take certain measures to gain an advantage from an agreement, although it is not stamped, you receive it in evidence to shew a guilty mind. There, it is used, not with a view to set it up, but to shew it was absolutely void, and as evidence of a fraud, and the guilty purpose in which they were engaged. So, again, if a man forges a bill of exchange, and puts it upon a wrong stamp, is it to be said that because it is forged upon a wrong stamp, the forgery cannot be established in a Court of law? It would not be the less a fraud or forgery on that account, and to hold it inadmissible, would be a departure from the spirit and letter of the act. The ground upon which it is brought forward in such cases is, that it is not valid, but merely evidence of the fraud, and this shews the general principle that the objection does not apply to collateral

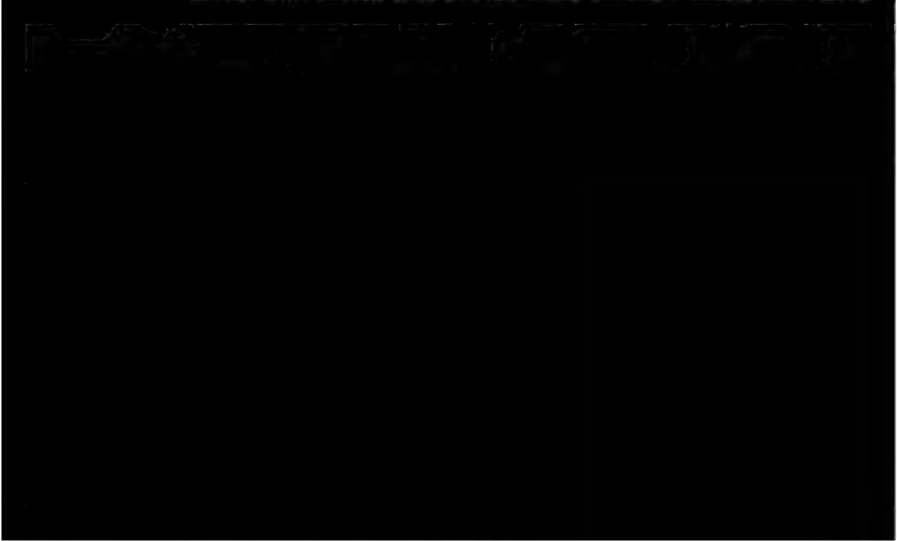
It was adduced there not to give effect to it, but to destroy the whole transaction. The *res gestæ* were, in themselves, illegal and corrupt, and, in that case, the Court thought it evidence. I also think that an agreement without a stamp is evidence in cases of usury, to prove the course of proceeding, where it is set up as evidence that the party entered into a corrupt contract. But a party charged with usury, could not give, in evidence, an unstamped agreement to rebut such a charge. The party on the one side would use it as an unlawful and void instrument, while the other would set it up as available. An ingenious man might put a thousand cases in which it might be difficult to say it was not evidence. Suppose a man could explain away an offence by shewing that he acted under a mistake derived from a written instrument; to shew that he offers it not as a valuable and available instrument, and to establish a right, but he sets it up in order to rebut the accusation of a guilty mind. Now, in this case, the document might have been available, had it never become perfect, as, for instance, if it had been cancelled before delivery. It was not, however, brought forward to shew that it was void by law, but as evidence of a binding contract between the parties, which they then meant to act upon, available, though not availing, and which, upon payment of the duty, would have become good. It was thus sought to establish the *bona fides* and the purity of their intention, and that they intended to do at that time what they did some months afterwards, which in effect was to make it available. Now, on the other hand, I will suppose that the defendant had taken upon himself the *onus probandi* in the first instance, that the whole transaction was a fraud. I do not say that he might not have given that assignment in evidence, and have shewn that it originated in a fraudulent conspiracy, and that it was merely colourable, being intended by and bye to be used for the purpose it was used for before a jury; or that the parties were hatching up evidence from time to time, to be used only when the

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immediate necessity arose, and the time came for the fraud to be practised, and it was then done away with; it might, I think, be evidence of such a corrupt agreement, and to shew the conspiracy. It was, therefore, an instrument which might be evidence for a party who sought to attack it, but not for a party whose object was to support it. In my opinion, an unstamped instrument cannot be received in evidence wherever the party tenders it, with a view to give any legal effect to it whatever.

ALDERSON, B.—I am clearly of the same opinion that this instrument was inadmissible. I take the rule to be as his Lordship has laid it down, that when an instrument is produced, in order to be set up as an agreement, and give effect to it as a contract, you cannot give it in evidence unless it has a stamp. Now, here it was attempted to be set up to give effect to it, that is to say, it was propounded as an instrument valid and effectual, for the purpose of conveying the property mentioned in it at the time it was executed. Although it had no stamp, yet it was a valid instrument the same as if it was stamped; and moreover, had a capacity to be made available in evidence, and was, therefore, properly rejected. The only cases in which such an instrument is allowed to be given in evidence without a stamp are, where it is used for the purpose of shewing that



equity. Coupling the first branch with the last in that sentence, we must understand it to mean that it is not to be given in evidence to make it available in any Court of law or equity. There may be collateral circumstances under which an unstamped instrument may be given in evidence, but it is difficult to define or lay down an abstract rule as to what is a collateral purpose. Here, the object distinctly was to shew that there had been a valid and subsisting agreement at a previous period, and as it was unstamped, it was not receivable. It is necessary to guard ourselves against laying down any general rule, especially in criminal cases; but as to the case put by Mr. *Williams*, I think no stamp necessary. He says, suppose a party indicted for larceny, might you not give in evidence an unstamped assignment of the goods. I think you might. There the issue would be, that a person took a particular chattel feloniously. You shew that he had executed something which he supposed gave him a right to take it, but you do not thus make the assignment available in law or equity. He merely took it thinking it gave him a right, when in truth it did not. So in a case of embezzlement, if the party accused had paid away the money on unstamped promissory notes, they would be evidence to shew the mistake under which he had paid it away.

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Rule discharged.

WILLIAMS, Executor of WILLIAMS, v. WILLIAMS.

ASSUMPSIT by the plaintiff, as executor of Henry Rumsey Williams, on a promissory note for 55*l.* 10*s.*, dated

To a plea of the Statute of Limitations, the plaintiff replied

that a writ issued under the 2 Wm. 4, c. 39, s. 10, and alleged that the writ was returned "by Henry Weeks and William Gilbertson:" *Held*, no ground of special demurrer.

Every writ issued under the 2 Wm. 4, c. 39, s. 10, in continuation of a preceding writ, should contain a memorandum, not only of the date, but also of the return of that writ.


Quære, whether a replication of writs having issued under the above statute, should conclude with a verification by the record, or refer to it.

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the 26th of November, 1831, payable to the testator six months after date: there was also a count on an account stated with the testator.

Plea. The Statute of Limitations.

Replication. That heretofore, and in the lifetime of the said H. R. Williams, deceased, and after the passing of a certain act of Parliament, passed in the second year of the reign of his late Majesty King William the Fourth, intituled, "An Act for uniformity of process in personal actions, in his Majesty's Courts of law at Westminster," to wit, on the 24th day of October, A.D. 1837, the defendant, being indebted to the said H. R. Williams, deceased, in respect of the promises and causes of action in the declaration mentioned: the said H. R. Williams, for the recovery of his damages, sustained on occasion of the non-performance, by the defendant, of the said several promises in the declaration mentioned, sued and prosecuted out of the Court of our Lady the Queen, before the Barons of her Exchequer, at Westminster, a certain writ close of our said Lady the Queen, called a writ of summons, bearing date the day and year aforesaid, whereby our said Lady the Queen commanded the defendant, therein described, of Wernlasdeg, in the county of Carnarvon, that within eight days after the service of the said writ on him, inclusive of the day of such service, he should cause an an-



the same, and to which said writ was subscribed a memorandum, that the same was to be served within four calendar months from the date thereof, including the day of such date, and not afterwards. And the plaintiff further saith, that afterwards, and within one calendar month next after the expiration of the said writ, including the day of such expiration, to wit, on the 1st day of March, A. D. 1838, came before the said Court, the said H. R. Williams, by H. Weeks, and W. Gilbertson, his attorneys, as aforesaid, and offered himself against the defendant in the action aforesaid: and the said H. Weeks, and W. Gilbertson, the attorneys who sued out the said writ, then and there returned, that the defendant was not found in the said county of Carnarvon, or within two hundred yards of the border thereof, and the defendant did not come, and had not appeared to the said action according to the exigency of the said writ, and the said writ, with such return as aforesaid, was then, and within one calendar month next after the expiration thereof, including the day of such expiration, entered of record according to the directions of the said statute. And thereupon the said H. R. Williams, by his said attorneys, prayed another writ of our said Lady the Queen, to be issued out of the said Court there, against the defendant, in continuance of the said first-mentioned writ, and it was granted to him, &c. And, thereupon, our said Lady the Queen, within one calendar month next after the expiration of the said first mentioned writ, including the day of such expiration, to wit, on the day and year last aforesaid, issued forth her other writ, in continuance of the said first mentioned writ close, whereby our said Lady the Queen commanded the defendant therein described as of Wernlasdeg, in the county aforesaid, as before she had commanded him, that within eight days after the service of the said writ on him, inclusive of the day of such service, he should cause an appearance to be entered for him in her said Court of Exchequer of Pleas at

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Westminster, in an action on promises, at the suit of the said H. R. Williams, and that he should take notice, that in default of his so doing, the said H. R. Williams might cause an appearance to be entered for him, and proceed therein to judgment and execution, which said writ bore date the day on which the same was issued, to wit, on the day and year last aforesaid, and was tested in the name of James, Lord Abinger, Lord Chief Baron of the said Court, and was indorsed with the names and place of abode of the said H. Weeks, and W. Gilbertson, the attorneys actually suing out the same, and to which said writ was subscribed a memorandum, that the same was to be served within four calendar months from the date thereof, including the day of such date, and not afterwards, and which said last mentioned writ contained a memorandum indorsed thereon, specifying the day of the date of the said first mentioned writ, &c., according to the directions of the said statute. After stating the return and recording of this writ, and the issuing of various other writs, in continuation, which were set forth with precisely similar memoranda and returns, the replication, without any reference to the record, stated the death of the testator, the abatement of the proceedings thereby, the commencement of the present action within one year after his death, and concluded with a verification.

Special demurrer assuring for causes. That it is so

random specified the day of the date of the next preceding writ: that the said replication in the last mentioned allegation uses the word or formula, "&c.," and the defendant is unable to infer therefrom what was included in the said memorandum in each instance, besides the day of the said date: that the said replication alleges and relies on several writs and returns, and on the entries of record thereof, and the replication ought in each instance to have verified the writ and return, and the said entry by the record thereof respectively, whereas the plaintiff omits to do so, and in lieu thereof concludes his replication with the common verification.

J. Jervis, in support of the demurrer. The first objection arises on the 10th section of the 2 Wm. 4, c. 39 (a), which provides, that no writ shall be available to prevent the operation of the Statute of Limitations, unless every writ

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(a) Sect. 10, "That no writ issued by authority of this act, shall be in force for more than four calendar months from the day of the date thereof, including the day of such date but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named, may not have been arrested thereon, or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or toward outlawry, shall be had thereupon, or unless such writ, and every writ, if any, is-

sued in continuation of a preceding writ, shall be returned, non est inventus, and entered of record, within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ, shall be issued within one calendar month after the expiration of the preceding writ; and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer, to whom the writ shall be directed, or his successor in office, and in process not bailable by the plaintiff, or his attorney suing out the same as the case may be."

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issued in continuation of a preceding writ shall contain a memorandum, specifying the day of date of the first writ, and return to be made by the plaintiff or his attorney suing out the same. Here, the replication states the return to have been made by two attorneys. [Lord Abinger, C. B.—That is a mere irregularity, the defendant cannot be prejudiced by it. *Alderson*, B.—There is no averment that they are distinct persons: for ought we know it may be the name of one person; and in that case it is only bad grammar.] A further objection is, that the indorsement on the second and subsequent writs should have contained a memorandum, not only of the date of the first writ, but also of the date of its return. The statute requires that every writ issued in continuation of a preceding writ, shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ and return. It then points out by whom the return is to be made. The mistake into which the plaintiff has fallen has arisen from a semicolon being placed in the ordinary copies of the act, between the words “writ” and “return.” The Parliament rolls contain no punctuation. In order to avoid the difficulty which thus arose in the construction of the act, the “&c.” is inserted, but the Court cannot, on special demurrer, supply the necessary allegation. The third and subsequent writs should also have mentioned the

must have reference to the next antecedent, namely, "memorandum," and then it would be that the memorandum in bailable process is to be made by the sheriff or his successor.

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ALDERSON, B.—If you read the enactment as only requiring the "return" to be made, it is perfectly good sense without any addition. The dates of the writ and the return are required, in order that it may appear that the writ has been returned within one month.

Upon the suggestion of the Court, *Atherton* prayed leave to amend.

ALDERSON, B., observed, that it would be better in future, instead of setting out all the writs (which might be as in this case numerous) to set out only the first and second, and state the rest to have been in the same form as the second.

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ASSUMPSIT. The declaration stated, that by a certain agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy a lot of building ground, situate, &c., which said lot the plaintiff agreed to sell for the sum of 120*l.*, which the defendant agreed to pay to the plaintiff on or before four years from the date of the said agreement, with interest at 5*l.* per cent. half yearly, until paid. Averment, that four years from the date of the agreement had not expired; that the sum of 120*l.* had not been paid, and that 12*l.* had become

A declaration alleged that the plaintiff agreed to sell, and the defendant to buy, certain land, for 120*l.*, which the defendant agreed to pay on or before four years, with 5 per cent. half yearly, until paid: Averment, that the four years had not expired, due for interest. that the plaintiff was ready and willing to convey.

and that the 120*l.* had not been paid, and that 12*l.* was due for interest. *Held*, that the declaration was good, without averring title to the land, or that the plaintiff was ready and willing to convey.

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due for interest. Breach: non-payment of the sum of 12*l*.

Demurrer and joinder. The defendant's point was, that the declaration did not aver that the plaintiff had any title to the ground, or that he was ready and willing to perform his part of the agreement.

Warren, in support of the demurrer. First, it should appear on the face of the declaration, that the plaintiff had a title to the land. *Luxton v. Robinson* (a), decided that in an action upon an agreement to deliver possession for certain considerations, subject to a forfeiture, on failure by either party; the person who is to deliver possession cannot sue for the forfeiture without shewing in his declaration a possessory title in himself. In *Hallewell v. Morrell* (b), lately decided, the Court of Common Pleas recognised the doctrine that a vendor must shew a title to convey. In *Souter v. Drake* (c), it was held, that in every contract for the sale of an existing lease there is an implied contract by the seller (if the contrary be not expressed) to make out the lessor's title to demise, and without shewing such title, the seller cannot maintain an action at law against the buyer for refusing to complete the purchase. *Roper v. Coombes* (d), also shews that a man is not bound to pay money under a contract for sale before

times that the question, whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case." Here, it is evident that the parties contemplated that the purchaser should be immediately put into possession, *Mattock v. Kinglake* (a), *Laird v. Pim* (b), and *Poole v. Hill* (c), are authorities in point.

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J. W. Smith, *contra*. The two questions resolve themselves into one, namely, whether the defendant's promise was in consideration of the plaintiff's promise or of his performance. If the plaintiff's promise was the consideration, the defendant has had that for which he contracted to perform his part of the agreement. No time is fixed for the conveyance of the land, but a time is limited for the payment of the purchase money. In *Mattock v. Kinglake*, *Littledale, J.*, says, "A time fixed for payment, and none for doing, that which was the consideration for the payment, an action lies for the purchase money without averring performance of the consideration." The same principle is laid down in *Campbell v. Jones* (d), which is recognised in *Glazebrook v. Woodrow* (e). In *Pordage v. Cole*, the declaration was similar to the present.

Warren replied.

PARKE, B.—I am of opinion that the declaration is good, and that it was not necessary for the plaintiff to aver his readiness and willingness to sell at every period of the contract. It is enough if he is ready and able to convey, when the title is to be made out. I also think

(a) 10 Adol. & E. 50.

6 M. & W. 835.

(b) 7 M. & W. 474.

(d) 6 T. R. 570.

(c) *Ante*, vol. 9, p. 300, O. S. ;

(e) 8 T. R. 366.

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that there is no ground for the objection that he has not averred that he had a title to the land. No time is fixed for the sale, but a time is limited within which the purchase money is to be paid with interest in the mean time. The consideration for the defendant's paying the interest is the plaintiff's undertaking to sell the land, not the actual sale of it. The plaintiff is not bound to do anything until the money is paid. The rule, as laid down in the note to *Pordage v. Cole*, applies strictly to this case; no time then being fixed by the agreement for the conveyance of the land, it cannot be a condition precedent. Nor can it be implied that the parties intended the conveyance to be made before the interest was paid, otherwise the plaintiff would be parting with his estate before he received the money. It may be that the parties meant that no conveyance should be executed until the principal money was paid, that is, at the end of four years; but as to that, it is unnecessary to give an opinion. The question here is, whether or no interest is to be paid before the plaintiff has given up possession of the land? I think it is, and that the conveyance of the land is not a condition precedent.

ALDERSON, B.—I am of the same opinion. If one act is to be done in consideration of another, the party suing for non-performance must aver performance on his part.

at variance with the intention of the parties. The vendor is not bound to convey the estate until he has the purchase money.

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Judgment for the Plaintiff.

RAMSEY and Others, Assignees of BODEN, a Bankrupt,
v. EATON.

ASSUMPSIT for money had and received to the use of the plaintiffs, as assignees, since the bankruptcy. Plea: Non assumpsit.

Notice of an act of bankruptcy given to the sheriff or his officer in possession, is not a notice to the execution creditor.

Seem, that a general notice to an execution creditor, that the defendant has committed an act of bankruptcy, is sufficient, without particularly specifying it.

At the trial, before *Purke*, B., at the York Spring Assizes, it appeared that the bankrupt, and his partner Bingham, who carried on the trade of razor manufacturers, at Sheffield, being indebted to the defendant, gave him a warrant of attorney to secure the payment of 272*l.* 1*s.* 2*d.* On the 22nd of May, judgment was entered up on this warrant of attorney, and a fieri facias issued under which the sheriff levied on the 24th of the same month. On the following day, the sheriff's officer, whilst still in possession, was served with the following notice.

To the High Sheriff of the County of York, his
Under Sheriff, and also to John Joseph Naylor
Ryalls, his bailiff.

"I do hereby, on behalf of the petitioning creditor, give you notice, that a docket in bankruptcy has been struck, and a fiat issued against John Amery Boden, of Sheffield, in the said county of York, razor manufacturer, dealer and chapman; and that prior to your entering an execution in his house and premises, an act of bankruptcy had been committed by the said John Amery Boden, I do, therefore, discharge you from selling or disposing of his property. Luke Palfreyman, solicitor to the petitioning creditor, under the fiat. Dated this 25th day of May, 1841."

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The sheriff's officer disregarded the notice, and neither communicated to the defendant or his attorney, the fact of his having received it, but proceeded with the sale, and on the 1st of June, paid over the proceeds to the defendant. Upon this evidence, it was objected, on the part of the defendant, first, that a notice to the sheriff or his bailiff, was not a notice to the execution creditor within the 2 & 3 Vict. c. 29, s. 1 (*a*), and, secondly, that this form of notice was insufficient, inasmuch as it merely intimated that an act of bankruptcy had been committed, without stating the nature of it. The learned Judge was of opinion that the assignees were not entitled to recover, and, accordingly, directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict.

Erle having obtained a rule nisi accordingly (*b*).

Wortley and *Pashley* appeared to shew cause, but the Court called on

(*a*) After reciting 6 Geo. 4, c. 16, s. 82, and 2 Vict. c. 11, s. 12, enacts, "that all contracts, dealings, and transactions, by and with any bankrupt, really and bona fide made and entered into, before the date and issuing of

or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: Provided also, that nothing herein contained, shall be deemed or taken to give validity to any payment made by any bankrupt,

Erle and *Baines* to support the rule. Although the recent act has abolished the old rule of law which required the lapse of two months to render valid an execution levied after an act of bankruptcy, yet it never could have been the intention of the Legislature to permit an execution to go on after the creditor had notice that the debtor was a bankrupt. The obvious intent was, that all proceedings should be stayed upon notice served upon the party trusted with the conduct of the suit, or under whose direction the law was put in motion. There was no ground for saying that the sheriff must sell, because notice had not been given to the execution creditor personally. If that were so, it would be difficult in many cases to give any notice; as for instance, if the execution creditor resided abroad, notice to a party who is agent of the creditor, for the purpose of affecting the execution, must be considered as notice to the principal. [Lord *Abinger*, C. B. — Admitting notice to an agent to be notice to the principal, how can it be said that the officer of the sheriff is the agent of the execution creditor?] The latter puts him in motion. [*Alderson*, B. It is the Court which orders its officer to execute the writ]. Although the sheriff is the officer of the Court, yet the execution creditor is the cause of his acting, and has, for many purposes, a control over him. As soon as the goods are sold, the sheriff becomes accountable to the creditor for the amount, without any immediate act of the Court, and the latter may recover the sum levied in an action for money had and received. *Hitchin v. Campbell* (a). So it is every day's practice for a plaintiff to control the sheriff by special directions, accompanying the delivery of the writ, and even to indemnify him for executing it. [Lord *Abinger*, C. B.—The circumstance of a person having in his hands the money of another, does not make him the agent of that other. A duty to pay over money may be created by law. *Parke*, B.—According to your argument, if the sheriff had

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received the proceeds of the execution, and had not paid them over, the assignees might have maintained this action against the execution creditor. If the sheriff is the agent of the execution creditor, the receipt by the sheriff would be a receipt by the creditor also.] The sheriff may sue the creditor for his poundage. *Stanton v. Suliard (a)*. The creditor invariably directs the sheriff, and even when a special bailiff is appointed, the sheriff still acts. [*Rolfe, B.*—Suppose the sheriff had been ruled to return the writ, and he had returned that he had not executed it, because he had received notice of an act of bankruptcy, would that have been a good return?] In such case the sheriff should apply to the Court under the Interpleader Act. If the officer had been indemnified, he would clearly have been the agent of the party. [Lord *Abinger, C. B.*—That does not follow; and even if he were the agent for the purpose of executing the writ, he is not necessarily the agent to receive the notice.] Secondly, the notice is in terms sufficient. All that is required is to warn the sheriff that the property is disputed. *Spratt v. Hobhouse (b)*, and *King v. Leith (c)*.

Lord ABINGER, C. B. — Notice to the bailiff was not notice to the execution creditor. The bailiff was not his agent.

instituting the suit having notice. Unless, therefore, the sheriff be the agent of the party, this notice cannot avoid the execution. In the absence of any special direction, of which there was no evidence, the sheriff cannot in any sense be deemed the agent of the execution creditor; he is simply the officer of the Court, and bound to obey its writ. If the Legislature intended that notice to the sheriff or his officer should have the same effect as notice to the party suing out the execution, it has made an error in the choice of the words used. We have no alternative but to construe them as we find them, and we cannot, on the facts before us, say that the execution creditor had either notice, knowledge, or means of knowledge, of this act of bankruptcy. As to the form of the notice, probably it would have been different if given to the party, as it intimates generally that an act of bankruptcy had been committed, and discloses enough to put the party upon inquiry. But it is not necessary to decide that point, inasmuch as we consider the sheriff the officer of the Court, and not the agent of the party.

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ALDERSON and ROLFE, B.'s, concurred.

Rule discharged. (a)

(a) The same question was raised in *Lawson v. Holloway*, in which *Coleridge, J.*, ruled that notice to the bailiff was sufficient, but reserved leave to the defendant to move to enter a nonsuit. A rule having been granted, it was, after argument in the above

case, made absolute. See *Rothwell v. Timbrell*, ante, vol. 1, p. 778, N. S., where it was held, that notice of an act of bankruptcy to the plaintiff's attorney was sufficient to invalidate an execution.

APPLEGARTH v. COLLEY.

BUTT moved, on the part of the defendant, for an interpleader rule. The defendant was the holder of a
 The Court will not grant an interpleader rule, where an action has been brought against the holder of a stake deposited with him to abide the event of an illegal race.

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stake of 29*l*., which had been placed in his hands, to abide the event of a steeple-chase. The race had been run, but a dispute arose between the plaintiff, whose horse came in first, and one Woffenden, the owner of another horse, and who claimed the stake, on the ground of some irregularity in the entering and running the plaintiff's horse. Both parties had served the defendant with a notice not to pay over the stake, and Woffenden had also threatened the defendant with an action. [*Alderson*, B.—How can we interfere?—the race is illegal.] *Evans v. Pratt* (a), decided that a steeple-chase is not illegal; but, assuming it to be so, the Court will not compel an indifferent party to set up that defence, but will afford him summary relief.

ALDERSON, B.—In this case, the race was for a less stake than 50*l*., and therefore illegal; consequently, the defendant has a good bar to the action. He had better at once return the money to the parties.

LORD ABINGER, C. B., GURNEY and ROLFE, B.'s, concurred.

Rule refused.

(a) *Ante*, vol. 1, p. 505, N. S. See *Challand v. Bray*, *ib.* p. 783.

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BRANDON v. EDMONDS.

HAYES moved to make absolute a rule to compute. The service of the rule nisi was effected by delivering a copy at the defendant's dwelling-house to a female, whom the deponent swore he believed to be a friend of the defendant staying at the house, and duly authorized to receive letters and messages for him.

Service of a rule to compute at the dwelling-house of defendant, on a female whom deponent believes to have authority to receive messages for defendant insufficient.

The Court held the service insufficient, the deponent only having sworn to his belief of the female's authority.

Rule refused.

Doe dem. FISHER v. ROE.

HUGH HILL moved for judgment against the casual ejector. The tenants were the Grand Junction Canal Company, and the land sought to be recovered formed part of the bed of a canal; the declaration was delivered to the clerk of the company, at their office. *Tupper v. Doe (a)*, was an authority to shew that such service was sufficient: there, a declaration in ejectment was served on the churchwardens and overseers of the parish, who rented a house for harbouring some of the parish poor, and did not otherwise occupy the house than by placing the poor in it; and such service was deemed sufficient. The peculiarity in this case was, that the company, being incorporated, the directors could not be recognised as distinct from the body itself. At all events, the service entitled him to a rule nisi.

In ejectment to recover the bed of a canal, service of declaration on the clerk of the Incorporated Canal Company, is sufficient for rule nisi.

PER CURIAM.—You may have a rule nisi.

Rule nisi granted.

(a) Barnes, 181.

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THOMPSON v. NICHOLAS.

Though a replication of nul tiel record concludes with an improper verification, it does not, therefore, require counsel's signature.

IN this case, the defendant had pleaded a judgment recovered, to which the plaintiff replied, nul tiel record, concluding with a simple verification. This replication not having been signed by counsel, the defendant treated it as a nullity, and signed judgment of non pros.

Butt had obtained a rule nisi, to set aside the judgment for irregularity, against which

Watson shewed cause, and argued, that every plea which concluded with a verification required counsel's hand.

LORD ABINGER, C. B.—As a general proposition that is not true; pleas of solvit ad diem, or son assault demesne, and this very replication of nul tiel record, do not require counsel's signature. The proper mode of ascertaining the necessity for such signature, is to look at the substance of the plea, not to its conclusion. In this case, the erroneous conclusion did not render the replication a nullity.

Rule absolute.

to one Ann King, and that no memorial thereof had been enrolled in the High Court of Chancery, according to the provisions of the 53 Geo. 3, c. 141, s. 2, whereby, and by force of the said statute, the said indenture became null and void. The replication set forth a memorial of the deed enrolled in the manner directed by the act, by which it appeared that the parties to the deed were the defendant and his wife, Ann King, by the name of Ann Papineau, of the first part, and the plaintiff of the second part. To this replication the defendant demurred, on the ground that the memorial set out in the replication differed in the names of the parties from the deed set out in the declaration.

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Ogle had obtained a rule nisi, to set aside this demurrer as frivolous, on the ground that as the wife of the defendant could not be a party to the covenant sued on, the insertion or omission of her name in the declaration was immaterial. He cited *Arnold v. Revault* (a), where, in covenant on a lease for not repairing, the instrument was described in the declaration to be made between the plaintiff of the one part, and defendant of the other; and on the production of the lease in evidence, it appeared to have been made by the plaintiff and his wife of the one part, and the defendant of the other. That was held to be no variance, although the premises demised were the property of the wife before marriage.

Willes shewed cause. The meaning of the plea is, that no valid memorial, such as the statute requires, has been enrolled, *Hicks v. Cracknell* (b). Here, it appears that the memorial states the deed to have been made between the defendant and Ann his wife of the first part, and the plaintiff of the second part. That is a variance from the deed declared upon. [Lord Abinger, C. B.—The wife

(a) 1 B. & B. 443.

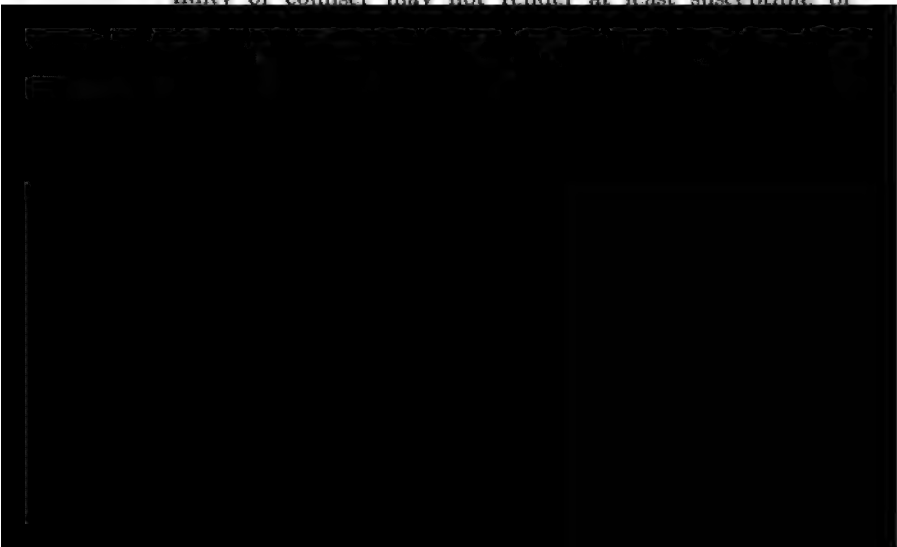
(b) 3 M. & W. 72.

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is no party to the covenant, so that it was unnecessary to mention her in the declaration.] This is not a question of variance under the plea of non est factum, but the objection arises from the terms of the Annuity Act, which expressly require that the parties to the deed shall be mentioned in the memorial. In an action on a judgment against A. B., to which the defendant pleads nul tiel record, a replication setting forth a judgment against A. B. by a different name, would be a variance. [Lord ABINGER, C. B.—In that case the record varies, because the judgment is stated to have been against A. B., and the record shews a judgment against C., who is, apparently, a different person. There should have been an averment that C. meant A. B.] *Arnold v. Revoult* is distinguishable from this case, because there, no interest moved from the wife; but here, it appears that the security for the annuity was the separate property of the wife.

Ogle, in support of the rule, referred to *Lysaght v. Walker* (a).

Lord ABINGER, C. B.—In my opinion this case will furnish good ground for our never granting a rule of this kind. It is difficult to suppose any point which the ingenuity of counsel may not render at least susceptible of



obviously frivolous, or is pleaded in direct opposition to some decided case, we ought not to entertain these applications, because the effect of setting aside a pleading as frivolous, is to deprive the opposite party of his writ of error.

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ROLFE, B., concurred.

Rule discharged.

—◆—
 SCHOLES and Another, v. HILTON.

J. HENDERSON had obtained a rule, calling on one Topham, to shew cause why an attachment should not issue against him for disobedience to a writ of subpoena. The writ required him to appear, on behalf of the defendant, "before our Justices assigned to take the assizes, in and for the southern division of the county of Lancaster, at Liverpool, within the same county, on Thursday, the 24th day of March, 1842," to give evidence, and produce documents on the trial of the cause. The 24th of March was the commission day at Liverpool, but the cause did not come on for trial until Monday, about half-past nine in the morning, when Topham was absent, and a verdict was found for the plaintiff. The affidavit upon which the rule was obtained, stated, that Topham was a material and necessary witness for the defence, and that had he appeared, the defendant would have succeeded in the action. The affidavits in answer, stated, that the action was in trover, to recover a deed relating to some leasehold property, which had been mortgaged by Topham, (who was sole trustee under the defendant's marriage settlement,) to a person deceased, and of whom the plaintiffs were executors: that the defendant claimed to hold the deed by reason only of his interest under that settlement, and that upon his counsel stating that he was prepared to prove these facts, by Topham, who could produce the draft of the

A subpoena requiring a party to attend the trial of a cause on the commission day, extends to the whole Assizes.

In order to obtain an attachment for disobedience to a writ of subpoena, it must clearly appear that the absence of the witness was voluntary.

Semble, that it is no answer to shew that the testimony of the witness was immaterial.

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conveyance, as well as two letters relating to the matter, but written without the privity of the plaintiffs, or their testator. *Rolfe*, B., who tried the cause, at once observed, that those facts afforded no defence, and that he should direct the jury to find a verdict for the plaintiffs. There was also an affidavit of *Topham*, in which he stated that he had been for some time in a very weak state of health; that he had been ready to attend the trial on the Saturday preceding the day on which it took place, and on the morning of the trial, being very unwell, he did not rise before ten o'clock: that he arrived at his office, which lay in his route to the Court, from his residence, which was at some distance, about half-past eleven, on the Monday morning, when, upon inquiry, he was informed that the cause had been tried, he denied any intention to treat the Court with disrespect.

Cowling shewed cause. The subpoena required *Topham's* attendance on the commission day only, and not according to the usual form, "from day to day until the cause is tried." The Court will not grant an attachment, unless it appears that the party was made fully cognizant of the duty which he is charged with violating. [*Alderson*, B.—The subpoena means, during the assizes: in con-

been granted without it being made out that the witness was a material witness for the party applying, and that in consequence of his absence the applicant has sustained damage." Here it appears that Topham was ill on the Monday morning, and that he did not keep away out of any disrespect to the Court.

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The Court then called on

J. Henderson. The witness is bound to shew that he was incapable of attending the trial, but he does not swear that he intended to go to the Court on the Monday, or that he was unable to do so, but only that he did not get up until ten o'clock. It is consistent with his statement that he may have been perfectly able to rise, more especially as he afterwards attended his office.

Lord ABINGER, C. B.—Upon these affidavits we see no ground for coming to the conclusion that the absence of the witness was voluntary. That fact should have clearly appeared, for we cannot assume that a party meant to commit a contempt. If the defendant has been prejudiced by the absence of the witness, he might have applied for a new trial on that ground. The sole question now is, whether the witness has treated the Court with contempt? It appears that he was not in the neighbourhood at the time of the trial, but came there soon afterwards, and upon inquiry found that the case had been tried. There is sufficient to shew that there was no intention to treat the Court with disrespect.

ALDERSON and ROLFE, B.'s, concurred.

Rule discharged (*a*).

(*a*) See *Vaughton v. Brine*, ante, vol. 8, p. 179, O. S.

1842.

The QUEEN v. RAY and Others.

In an information at the suit of the Crown, issue was joined in Trinity Term, 1838, and notice of trial then given, which was afterwards countermanded.

No further step being taken, the defendant, in Hilary Term, 1842, obtained a rule nisi to set down the cause for trial at the Sittings after Easter Term: *Held*, that the Court had no power to make the rule absolute, the Attorney General objecting thereto.

IN Easter Term, 1838, this information at the suit of the Crown was filed against the defendants as executors of one Ray, deceased, for breaches of the covenants contained in a lease granted by the Crown to Ray. In the same Term, the defendants pleaded; in the following Term, issue was joined, and notice of trial given, which was afterwards countermanded. No further proceedings were taken until July, 1841, when a bill was filed in Chancery, for taking, *de bene esse*, the depositions of a witness on the part of the Crown. His testimony was accordingly taken, but he was not cross-examined by the defendants.

Swann, (in Hilary Term, 1842), moved for a rule, to shew cause why the information should not be dismissed for want of prosecution, or why judgment of nonsuit should not be entered. The Court refused the application, but granted a rule to shew cause why the defendants should not be at liberty to set down the cause for trial at the Sittings after Easter Term.

Sir *F. Pollock*, (Attorney General), in Easter Term shewed cause and submitted that the rule could not be

1842.

RUSSELL v. LOWE.

PITT TAYLOR moved on behalf of the plaintiff for leave to enter an appearance for the defendant upon an affidavit, which stated, that on the 11th May instant, a copy of the writ of summons had been left at the dwelling-house of the defendant, and on the 19th, the clerk of the defendant's attorney called with that copy, on the plaintiff, and promised to enter an appearance. It was urged, that, as the copy of the writ had evidently been received by the defendant, it was equivalent to a personal service. ———

v. *Russell* (a), decided in the bail Court, was referred to.

The Court has no power to allow a plaintiff to enter an appearance for a defendant, where a copy of a writ has been left at his dwelling-house, and he has admitted the receipt of it.

Lord ABINGER, C. B.—We cannot grant the application. You are asking us to give you the benefit of a statute, because you have not been able to comply with its provisions.

ALDERSON, B.—How can we repeal the acts of Parliament? The only means by which a plaintiff can enter an appearance for a defendant is by statute, and the statutes, (5 Geo. 2, c. 27, and 2 Wm. 4, c. 39,) require an affidavit to be made and filed of the personal service of the writ. Moreover the Uniformity of Process Act, 2 Wm. 4, c. 39, requires the person serving the writ to indorse on it the day of the month and week of the service. We are asked to dispense with both these matters. We have before decided that we cannot grant such application, and, notwithstanding the decision in the Bail Court, I am of the same opinion still.

Rule refused.

(a) Not reported.

1842.

BIRD v. HOLMAN.

To a declaration on a deed of apprenticeship, the defendant pleaded that the said "indenture" was not his deed: *Held*, that a special demurrer to such plea was not frivolous.

THIS was an action on a deed of apprenticeship, by which the defendant covenanted to pay certain instalments for the instruction of a youth. The declaration throughout described the instrument as a "deed" and "deed of apprenticeship." The defendant pleaded that the said indenture of apprenticeship in the declaration mentioned is not his deed. The plaintiff demurred specially, on the ground that there being no allegation of an indenture, the plea traversed that which was not alleged in the declaration. A Judge, at Chambers, having made an order to set aside the demurrer as frivolous.

Bere had obtained a rule nisi to rescind that order, against which

Warren shewed cause, and contended, that as the instrument of apprenticeship contained mutual covenants, it was clearly an indenture, although not so described in the declaration. The plea amounted to non est factum, and denied that the deed upon which the plaintiff had declared, was the deed of the defendant. He referred to *Risdale v.*

Kelly (ex Tupper) v. Colman (D)

but it is not so described in the declaration. A deed-poll may contain many conditions precedent, and yet not be an indenture. The rule will be absolute without costs, and the defendant may have liberty to amend his plea.

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ALDERSON, B.—The plea does not contain a negative of a given proposition.

Rule absolute.

Sir John MORRIS, Bart., v. VIVIAN and Another.

THIS was an action for injury to the plaintiff's mine, by reason of the defendants' having permitted water to flow into it from an adjacent mine, belonging to them. The cause was tried by a special jury, at the last Glamorganshire assizes, when a verdict was found for the defendants.

The circumstance of two of the jury having, on an adjournment of the trial, before they were charged, dined and slept at the house of the party in whose favour, a verdict was ultimately found, does not vitiate the verdict. In such a case, it is discretionary with the Court to set aside the verdict, and they will not do so, unless there is some imputation of unfair conduct.

E. V. Williams had obtained a rule nisi to set aside the verdict, and for a new trial, upon affidavits which stated that the trial lasted two days; and on the evening of the first day, and before the Judge had commenced summing up, two of the jurors went to Mr. Vivian's house, and dined and slept there. The affidavits in answer, stated, that Mr. Vivian resided near Swansea, and that it was customary in Glamorganshire, at the assizes, for gentlemen coming from a distance to attend them, to be invited to the houses of the neighbouring gentry: that there was but one inn, which afforded very indifferent accommodation, and that one of the two jurors, upon his arrival in the town, had met Sir John Morris, who expressed his regret that he was unable to entertain him, in consequence of the absence of Lady Morris: that Mr. Vivian was trustee of the mine, and had only a very slight interest in it, and that no allusion to the subject of the trial had been made to either of the jurymen during their stay in his house.

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Chilton, J. Evans, and Groves, shewed cause. The law with respect to treating juries is thus laid down in *Co. Litt.* 227 *b*, "If the jurie, after their evidence given into them at the barre, doe at their own charges eate or drinke either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict; but if before they be agreed on their verdict they eate or drinke at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict, but if it be given for the defendant, it shall not avoid it, et sic è converso." The treating thus alluded to is evidently a treating of the whole jury, and not merely of one or two, and moreover it is a treating after the summing up. The same may be said with respect to the observations of the Court in *Trewennarde v. Shewys* (*a*). Where it was assigned for error, that the jurors, after the charge was given, and before their agreeing in their verdict, ate and drank at their own costs, and this was challenged and entered before the taking of the verdict, and the Court said it had been often ruled, that for the jury to eat and drink, if at their own costs, is only a fineable offence; otherwise, if it had been at the costs of one of the parties, for that induces affection and suspicion, &c. So, with respect to *King v. Burdett* (*b*), where *Holt*, C. J., says, "if a jury eat at their own charge, it is fineable, but that verdict shall stand: otherwise, if at the charge of one of the parties, and

slightest belief that the two jurors had been in any degree influenced by their visit to the defendant. It is true that all the cases of treating to be found in the Books are where the jury have retired to consider their verdict, yet the ground upon which the Courts have proceeded, namely, that the treating inclines favour and affection, applies equally to this case. The authorities are collected in *Vin. Abr.* tit. "*Trial*," (G. 8); *Bro. Abr.* tit. "*Jurours*." So jealous is the law upon this point, that the sheriff is not allowed to summon the jury, if he is in any way related to the parties, or interested in the event of the suit. The policy of the law is to avoid the possibility of suspicion that the jury have favoured the one side or the other, but such suspicion would be equally created in the minds of the public, whether the treating took place before or after the summing up. It is argued, that the treating alluded to in the authorities cited, is a treating of the whole jury, and not of one or two individuals only, but the same rule which forbids the treating of all, would equally apply to any part. If it were not so, this absurdity would follow, that a party might, without risk, treat eleven out of the twelve. It is a settled and established principle of law, that a treating of the jury avoids the verdict. If this verdict be permitted to stand, it will create distrust among the public, who regard Mr. Vivian as the real defendant in the case.

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LORD ABINGER, C. B.—It may be the province of a dramatic writer to please the public, but our business is to administer justice, and, in so doing, not to permit ourselves to be influenced by any apprehension of the opinion which the public may form. If the learned Judge who tried this cause had thought the verdict against the weight of evidence, that circumstance might have induced us to look for some motive, and if we had found any corrupt motive, we might have been inclined to set the verdict aside. But it is expressly stated that, in the opinion of all parties, the jurors were not in the least influenced by their residence in Mr. Vivian's house, nor is there the slightest imputation of

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corruption or favour. If the public are to form an opinion, let them understand that this was a case in which all imputation of influence or favour was entirely disclaimed. What are the facts?—there was but one inn, which afforded very indifferent accommodation, and, in consequence, two of the jury, (one of whom, but for an accidental circumstance, would have been invited by Sir John Morris to his house,) found their way to the Vivians. He had no substantial interest in the suit, and the matter was never discussed at his house. Under these circumstances, we ought not to set aside this verdict, unless there is some peremptory rule obliging us to do so. Do the cases establish any such rule?—All they shew is, that where the jury retire to deliberate on their verdict, if they eat and drink at their own expense, they may be fined, if at the expense of the party for whom the verdict is given, it is void. Those cases seem to apply to the whole jury, and also to acts done by them after they are charged. It is quite clear, that in this case they could not have been fined for eating and drinking at their own expense, and I do not see that they fall within the other branch of the rule. Then it is a case in which we are called upon to exercise our discretion; and I think we ought not to set aside the verdict, since, by doing so, we should be casting an unfounded imputation on these gentlemen.

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ASSUMPSIT. The declaration stated that the plaintiff before and at the time of the making of the agreement thereafter mentioned, was lawfully possessed for the residue of a term of years, whereof twenty-one years from the 24th of June, 1841, were then to come and unexpired of a certain dwelling-house, and thereupon to wit, on the 31st of March, 1841, by a certain agreement made between the plaintiff and the defendant, it was agreed that the plaintiff should, on or before the 24th of June, 1841, let to the defendant, and that the defendant should become tenant to the plaintiff upon the terms that the letting should be by a lease, to be executed and granted by the plaintiff for twenty-one years, the said term to commence from the 24th of June, 1841, when the plaintiff was to execute such lease; that although the plaintiff had performed and fulfilled all things in the agreement contained on his part to be performed, and although he was within a reasonable time after the making of the said agreement, and on the said 24th of June, 1841, ready and willing to let to the defendant the said house and premises, and to grant and execute to the defendant the said lease, yet the defendant did not nor would at any time, on or before the said 24th of June, 1841, become tenant to the plaintiff of the said dwelling-house.

A declaration stated that the plaintiff, before, and at the time of making the agreement thereafter mentioned, was lawfully possessed for the residue of a term of years, of a dwelling-house, and, thereupon, it was agreed that the plaintiff should, on or before the 24th of June, let to the defendant, and that the defendant should become tenant by a lease to be granted by the plaintiff for twenty-one years, from the 24th of June : Averment, that plaintiff had performed all things on his part to be performed, and was, on the 24th of June, ready and willing to let to the defendant, yet the defendant would not become tenant : Pleas, first, that the plaintiff was not possessed for the residue of the term, modo et formâ. Secondly, that

Pleas. Secondly, that the plaintiff was not lawfully possessed of the said dwelling-house for the residue of the said term of years modo et formâ. Thirdly, that the plaintiff, at the time of the agreement, had not a good title to, and could not on the said 24th of June, 1841, legally let to the defendant, or grant and execute to her

plaintiff, at the time of the agreement, had not a good title to, and could not, on the 24th of June, let to defendant, or grant a lease for the said term.

Held, on special demurrer, that the pleas were bad; and that the averment of the plaintiff's readiness and willingness to grant a lease was equivalent to an averment of title.

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a lease of the dwelling-house for the said term of twenty-one years.

Special demurrer, assigning for causes to the second plea, that the traverse was immaterial, as it merely denied that the plaintiff was possessed of the term before and at the time of the agreement, whereas it would be sufficient for the plaintiff to shew that he was possessed of the term on or before the 24th of June, so as to be able on that day to complete the agreement. The causes of demurrer to the third plea were, that it was an informal traverse of the plaintiff's averment of his readiness and willingness to let the house and execute the lease, and that it put in issue more than was alleged in the averment, namely, that the plaintiff had not good title to let the dwelling-house or execute the lease.

Martin, in support of the demurrer. The second plea raises an immaterial issue, since the plaintiff could fulfil all the terms of the agreement by being in a condition to grant a lease on the 24th of June. The third plea is also bad. It has never been determined that when a party agrees to make a lease of premises at a rack rent, he is bound to produce the lessor's title. It is true, that in *Souter v. Drake (a)*, it was held that in every contract of an existing lease, there is an implied undertaking by the

such matters be immaterial. The plea is also bad in form, since it ought to shew from what cause the plaintiff was unable legally to let the premises. The case of the *Abbot of Strata Mercella* (a). Unless the ground of the plaintiff's incapacity appears, the cause may go to trial upon matter of law or matter of record, which are not properly triable by a jury.

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G. T. White, contra. The declaration is bad, in not averring that the plaintiff had a title to grant a lease on the 24th of June. In *Luxton v. Robinson* (b), it was held that a party who sues for a forfeiture on an agreement by him to deliver up possession must shew in his declaration a possessory title in himself. [*Parke*, B.—Is it sufficient for the plaintiff to aver that he was ready and willing to grant a lease to the defendant without stating his ability to do so?] In *Martin v. Smith* (c), it was held necessary for the plaintiff to aver that they had made a good title to the defendant. In *Laythorpe v. Bryant* (d), the plaintiff stated in his declaration that he was possessed of a certain lease of certain premises for a certain term of years, which he put up for sale, and which the defendant purchased; and the breach alleged was, that the defendant refused to accept an assignment of the lease; it was held that the plaintiff, to prove his title, must prove the execution of the original lease as well as of the mesne assignments to himself. The defendant was at liberty to traverse the inducement, as it is that which entitles the plaintiff to his action, *Com. Dig.* tit. "*Pleader*," (G 14), *Kimersly v. Cooper* (e). *Carvick v. Blagrove* (f), is also an authority in point. The plaintiff should have averred that he offered to execute a lease, *Jones v. Barkley* (g).

(a) 9 Co. 24.

(b) 2 Doug. 620 a.

(c) 6 East, 555.

(d) *Hodges*, 19.(e) *Cro. Eliz.* 168.

(f) 1 B. & B. 531.

(g) 2 Doug. 684.

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Martin, in reply. It is conceded that the plaintiff is bound to aver in substance, that he has performed, or is ready and willing to perform, everything in the nature of a condition precedent. The contract is, that on or before the 24th of June, he would let to the defendant, and that the defendant should become tenant of, the premises in question. The declaration avers his readiness and willingness to grant a lease, and if that averment had been traversed, and it had been proved that the plaintiff had no title, the issue would have been found against him. In *Lawrence v. Knowles* (a), *Bosanquet*, J., says, "I cannot conceive any circumstance more indicative of want of readiness than incapacity. *Jones v. Barkley*, has been to a great extent overruled by *Poole v. Hill*" (b).

LORD ABINGER, C. B.—I am of opinion that the plaintiff is entitled to judgment. First, it is said that the traverse is immaterial, because the plaintiff might not be possessed of the term at the time he made the agreement, yet if he was ready and willing to make the lease in question within a reasonable time afterwards, it becomes unimportant whether he could make it on the precise day. The first traverse is bad on that ground. Then it is objected that the declaration is bad, inasmuch as it does not state that the plaintiff had a good title on the precise date of the

to the defendant. If there had been a traverse in the terms of the declaration, that he was not ready and willing on the 24th of June, it would have been a good traverse, and the defendant might have shewn that the plaintiff was not able on that day to perform his contract. Ready and willing implies disposition, capacity, and ability. The traverse should have been in the very terms of the allegation.

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PARKE, B.—I am of the same opinion, though I had some doubt in the course of the argument. With respect to the declaration, the objection must be considered as taken on general demurrer, in which case I think the declaration good. As to the first traverse, it raises an immaterial issue. The allegation on the declaration is, “that the plaintiff, at the time of the agreement,” was lawfully possessed of the dwelling-house for the residue of a term: the plea states that he was not lawfully possessed for the residue of the said term modo et formâ. It appears to me, that such plea does not raise the question as to whether he was possessed on the 24th of June, and that the allegation contained in the traverse is immaterial, and at first doubted whether the language of the declaration did not imply that the plaintiff was possessed of the term, not only at the time of making the contract, but also at the time appointed for executing the lease; if that had been the meaning of the declaration, the traverse would have been good, but I think the meaning is simply that the plaintiff was possessed at the time of making the contract. Then the fact of his not being possessed at the time of making the agreement is wholly immaterial, so that he was of ability to make a good demise on the day appointed for the completion of the contract. With regard to the other plea, it is too large for the reasons already pointed out. The question then is, whether or no the declaration is sufficient? The meaning of a contract to demise is not simply to go through a form

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of delivering a paper which imports that it is a demise, but that the party assuming to make the demise shall have a title. The issue of non demisit involves not only the fact of a lease, but the capacity of the person to grant it. A lessee bargains for a good lease, and the lessor cannot maintain an action against him, unless he had power to make a lease. It is therefore essential to shew by the declaration, that the landlord had power to make a good lease. The question then is, whether this declaration substantially contains any such allegation? First, there is a general averment that plaintiff had performed all things on his part to be performed. Upon general demurrer, such averment has been held to be a sufficient allegation of the performance of a condition precedent. There is a decision of Lord *Holt's* to that effect in *Carthew's Reports* (a). But supposing that averment omitted, there is an allegation that the plaintiff was ready and willing to execute a lease on the 24th of June, and the question is, whether, upon general demurrer, the term "paratus" does not import that the plaintiff was ready and able, in point of law, to execute a lease? This matter has been already under consideration in the Court of Common Pleas, in the case of *Lawrence v. Knowles* (b), where, under a similar averment, the Court were of opinion that it did, and this Court laid down the same doctrine in *Hibbleschite v. M'Morine* (c). In the latter case,

demurrer, and that our judgment ought to be for the plaintiff.

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ALDERSON, B.—I am of the same opinion. The pleas are bad, and the declaration good on general demurrer. The first plea takes issue on an immaterial averment. The declaration states, that before, and at the time of the agreement, the plaintiff was lawfully possessed for the residue of a term of a certain dwelling-house. That is not material to the plaintiff's right to recover under the agreement: he might be lawfully possessed on the 24th of June, though he was not possessed at the time of making the agreement. Possibly the term might have ceased to exist as a term by merger, yet, if he could grant a lease, he would be prepared to make a title on the 24th of June. The other plea stands upon precisely the same footing as the first, and for the same reason I think it raises an immaterial issue. Then is the declaration good? Whatever be the construction of the agreement, the averment that the plaintiff was ready and willing to perform, includes a capacity to do so.

ROLFE, B.—Whether the vendor is bound to aver title or to execute a lease, the declaration is good on general demurrer. The allegation is in effect that the plaintiff was ready and willing to do all things necessary, whether to shew a title or to tender a lease.

Judgment for Plaintiff.

SMITH v. WILLIAM HENDERSON.

CASE for negligently navigating a vessel, whereby it ran foul of, and damaged the plaintiff's vessel. Plea, not guilty.

A declaration for negligently navigating a vessel, described the defendant as

William Henderson, a pilot; At the trial, the plaintiff's counsel called "Mr. Henderson," intending to examine the son of the defendant, as to his identity, when a person answered "here," and said "I am the pilot;" it was proved that this person was acting as pilot immediately after the collision: *Held*, sufficient evidence of identity.

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At the trial, before *Rolfe*, B., at the Middlesex Sittings, in Hilary Term, it appeared that the action was brought against the defendant, as the pilot who had charge of the vessel when the collision took place. At the close of the plaintiff's case, it was objected that there was no evidence to shew that the defendant was the person who acted as pilot, whereupon the plaintiff's counsel called "Mr. Henderson," intending to examine the defendant's son. A person in Court answered, "Here," and, coming forward, said; "I am the pilot." He was not sworn, but a witness, who was present immediately after the accident, stated, that he had seen this person then acting as pilot. The learned Judge thought there was not sufficient evidence of the identity of the defendant, and directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for the amount of damage proved.

Martin having obtained a rule nisi accordingly,

Montagu Chambers shewed cause. The defendant ought not to be concluded by the answer of a person not sworn. It is true that he answered to the name of Henderson, but unless it also appeared that his Christian name was William, one step only was taken towards proving the identity. Where issue is joined on the plea non est factum, some

Lyon (a), will be relied on by the other side; there, the identity of the defendant was made out by character and description, as well as by name.

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Martin, contra, was stopped by the Court.

LORD ABINGER, C. B.—The rule must be absolute. An action is brought against William Henderson, a pilot, and a person in Court answers to the name of Henderson, and is proved to have been acting as a pilot, and to have been on board the vessel in question at the time of the accident. That appears to me sufficient for the jury to presume that the defendant was the person who acted as pilot. But then it is said that the answer is not admissible, because it was not given upon oath. As to that, I must observe, that there are many things which are incapable of strict legal proof; for instance, what the Scotch law terms the status of an individual, is a matter of reputation; and if precise evidence were required of the relationship of one man to another, or of other facts of that nature, proof for the most part would be deficient. I think there was sufficient evidence of identity, although the Christian name of the party was not proved to be William: first, he was a pilot; secondly, he was shewn to have been on board the vessel; and thirdly, he answered to the name of Henderson.

PARKE, B.—I am of the same opinion. It appears to me, that there was some evidence for the jury of the defendant's identity. The declaration shews, upon the face of it, that the defendant is William Henderson, and a pilot. A person in Court answers to the name of Henderson, and is a pilot, and is proved to have been on board the vessel acting as pilot. In two respects, at least, he answers the description of the defendant in the declaration; he bears

(a) 1 B. & Ald. 182.

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the same surname, and is of the same calling. There was certainly enough for the jury to presume the identity.

ALDERSON, B.—I am of the same opinion. If the strict proof contended for were held requisite, it would be almost impossible to try many cases.

ROLFE, B., concurred.

Rule absolute.

GRAZEBROOK and Another v. PICKFORD and Another.

The assignees of a bankrupt having set up a claim to certain goods in the possession of a carrier, the latter applied to a Judge under the first section of the Interpleader Act, when it was ordered, that unless cause was shewn to the contrary, on a day named,

IN this case an application had been made at Chambers under the first section of the Interpleader Act (1 & 2 Wm. 4, c. 58.) It appeared that the defendants, who are common carriers, received in Staffordshire certain goods for carriage consigned to one Charles Hoppe, of Blackfriars-road, Surrey; that before the delivery of the goods to Hoppe, the same were claimed by the plaintiffs, who were the vendors of the goods, and subsequently another claim was set up by certain persons under an assignment from Hoppe, for the benefit of his creditors. Afterwards, Hoppe became bankrupt, and the goods were demanded

their claim to the goods. On the 16th of December, an order was made by *Alderson*, B., "that unless cause be shewn to the contrary on a day named, the assignees of Hoppe be barred their claim to the goods in question, and that they pay to the plaintiffs the costs of that application; that the defendants deliver up the goods claimed to the plaintiffs, and pay their costs of the action, which should then be finally stayed, and that the assignees do pay to the defendants their costs of the action, and of that application, and repay to them the plaintiffs' costs of the action." On the day named in the order, the attorney for the assignees attended before the Judge and opposed the order being made absolute, when the learned Judge discharged the order, on the ground that the summonses upon which it was drawn up, were not returnable on two successive days. On the 18th of December, the defendants took out a summons before *Alderson*, B., calling on the plaintiffs and the assignees of Hoppe, to shew cause why they should not appear and state the nature and particulars of their respective claims to the goods in question. On the return of this summons a second issued, and two other summonses of a similar nature were subsequently served on the assignees, to none of which did they appear. On the 23rd of December, the following order was made by *Gurney*, B.:—

"I do order that the claim of the assignees of Hoppe, a bankrupt, be barred to the goods in the hands of the defendants, the subject of this action. And I further order that this action be discontinued on payment by the defendants of the plaintiffs' costs, and delivery up of the said goods on payment for the carriage. And I do further order that the said assignees repay the defendant the costs so paid by them to the plaintiffs, and also the defendants' costs."

Kelly moved on behalf of the assignees of Hoppe, for a rule to alter so much of the said order as required the

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assignees to pay costs. Under the circumstances of this case the learned Judge had no jurisdiction to order the payment of these costs. The first section of the 1 & 2 Wm. 4, c. 58, enables the Court to make rules and orders, calling on a third party to appear and state the nature and particulars of his claim, and maintain or relinquish his claim; and the third section provides, "that if such third party should not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators, saving nevertheless the right or claim of such third party against the plaintiffs, and thereupon to make such order between such defendant and the plaintiff as to costs and other matters as may appear just and reasonable." *Lambert v. Cooper (a)*, decided that the Court had no power under the statute to order a claimant who does not appear to pay costs. Here, there was no appearance by the assignees upon the summonses, calling upon them to state the nature and particulars of their claim. It is true that they appeared upon the order nisi, but that was not an appearance which gave

Judge jurisdiction to award costs. Any suggestion which such third party might make, either to induce the Judge to act or not with respect to the matter before him, would be sufficient. [*Parke, B.*—In that case you might always bring a party before a Judge, by making him pay the costs if he did not come.] This order may be supported under the latter part of the first section of the act, which enables the Court or a Judge “to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable.”

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Kelly, in reply. The order nisi was not an order under the Interpleader Act. The assignees conceiving that they had abandoned their claim, did not appear on the summonses, and an order has been made upon them to pay costs in a proceeding to which they were no parties. (He was then stopped by the Court.)

PARKE, B.—The rule must be absolute. There was no appearance upon the summons under which the order of my brother *Gurney* was made. With respect to the appearance upon the order nisi, it is enough to say that that is not an appearance within the meaning of the statute. If the party appears to litigate his claim that gives the Judge jurisdiction as to costs, but here, there has been no such appearance.

ALDERSON, B.—It seems to me quite clear that there has been no appearance upon the summons on which the order was made. The ground on which that order proceeds is, that the case is one within the third section of the act. But the assignees never attended the summons, which was the foundation of the order.

Rule absolute.



1842.

MITCHELL v. CRAGG.

To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that after the bill became due, he paid the drawers, then being the holders, the sums of 4*l.* 12*s.* and 2*l.* 10*s.*, which sums, together with the price and value of a horse, which the defendant had then sold to the drawers, and which it was then agreed should be set-off against the defendant's acceptance, the drawers accepted in satisfaction and discharge of the amount of the bill, and that the bill was not transferred to

ASSUMPSIT on a bill of exchange for 16*l.* 12*s.*, drawn by Fogo and George upon, and accepted by, the defendant, and indorsed by Fogo and George to the plaintiff.

The defendant pleaded, thirdly, that after the bill became due, Fogo and George then being the holders, applied to the defendant for payment of the bill; that the defendant then paid to Fogo and George the sums of 4*l.* 12*s.* and 2*l.* 10*s.*, which sums (together with the price and value of a certain horse which the defendant had then sold to Fogo and George, and the price and value of which it was then agreed by and between the defendant and Fogo and George, should be set-off and allowed against the defendant's acceptance). Fogo and George accepted in full satisfaction and discharge of the amount of the said bill, and of the defendant's acceptance, and that the bill was not indorsed or transferred to the plaintiff until after the said satisfaction and discharge, and after the bill became due and payable.

Fourthly, that before the bill came into the possession of the plaintiff, it was indorsed in blank by Fogo and George to Cadman and Co., and that after the bill became due, it then being in the hands of Cadman and Co., Fogo and

and George, and the price and value of which it was agreed between the defendant and Fogo and George, should be set-off against the acceptance of the defendant. Fogo and George then accepted it in full satisfaction and discharge of the amount of the said bill of exchange, and of the defendant's acceptance: that at the time of giving the second bill by Fogo and George, and at the time of the settlement between the defendant and Fogo and George, the bill remained in the hands of Cadman and Co.; that the bill mentioned in the first count was not transferred to the plaintiff until after the said satisfaction and discharge, nor until after the giving of the second bill by Fogo and George, nor until after the said bill became due.

Replication to the third and fourth pleas. That the said plea and the statements therein contained, in manner and form as the same are therein pleaded and set forth, are not true in substance and fact, and this the plaintiff prays may be inquired of by the country.

Special demurrer, assigning for causes that the replication improperly attempted to put in issue all the matters alleged in the plea, and was multifarious and improper, not being a replication in form de injuriâ: that the pleas contained matters of discharge, and also an authority, and, therefore, the general replication was insufficient.

The principal point marked by the plaintiff for argument was, that the defendant attempted in his third plea to shew his discharge of his liability as acceptor by accord with satisfaction to Fogo and George, but stated no facts amounting to a good accord and satisfaction, or to a good discharge of the said bill in any way.

Martin, in support of the demurrer. First, the pleas are good by way of accord and satisfaction to Fogo and George, and as it is expressly averred that the bill was indorsed by them to the plaintiff after it became due, the latter must have taken it, subject to all these equities which the defendant had against the indorsers. The form of replication

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is inapplicable to such a plea. The breach alleged is the non-payment of the bill when it became due; the plea does not shew an excuse for the breach of promise, but sets up matter of discharge. It is true that the right of action is assignable, but that does not alter the breach, which is complete when the acceptor fails to pay the bill. The plea admits the breach, but shews that it is satisfied by something which subsequently occurred. Where to an action by indorsee against acceptor of a bill, the defence set up was, that a third party was the indorsee and holder of the bill, the Court held that *de injuriâ* was not a proper replication, on the ground that the plea was in substance a denial of the breach alleged in the declaration. *Schild v. Kilpin* (a). [*Alderson*, B.—That case is different: here, the declaration states that the plaintiff claims as indorsee of Fogo and George; the plea admits him to be indorsee, but under such circumstances that the defendant is excused from payment.] The breach alleged is the non-payment of the bill at the time it became due: the fact of the bill having been afterwards indorsed, cannot alter the nature of the contract. [*Parke*, B.—The breach is, that the defendant did not pay the plaintiff: the plea in truth says, “I admit I never did pay the plaintiff, because he was the holder of the bill under such circumstances that he was not entitled to be paid:” it is like the case of *Isaac v.*

to the damages as well as to the debt. In *Francis v. Crywell* (a), the defendant pleaded payment in satisfaction of the promises in the declaration mentioned; to which the plaintiff replied, that before exhibiting the bill, he had sued out a latitat, and that the defendant did not before that writ was sued out, pay the plaintiff, &c.: on demurrer to the replication, it was held that the plea was bad, because it did not allege the payment to have been in discharge of the costs and damages accrued by reason of the non-performance of the promises. [*Parke*, B.—Here it is as if the objection arose on general demurrer, and the allegation “that the money and horse were accepted in full satisfaction and discharge of the amount of the bill,” must, upon general demurrer, be taken to mean the bill and damages. *Alderson*, B.—The ordinary meaning of the word “amount” is the sum of principal and interest.] It is not averred that the money was paid by defendant in satisfaction of the bill, but only that Fogo and George accepted the money and horse in satisfaction. *Crisp v. Griffiths* (b) shews that such averment is insufficient. [*Parke*, B.—The words in “full satisfaction” overrule the whole sentence.] A further objection is, that as the price of the horse is not mentioned in the plea, it does not appear that the two sums of money, and the price of the horse, equal the sum to which the accord and satisfaction is pleaded. The authorities establish that a plea of accord and satisfaction must shew that the thing given in satisfaction is of equal value with the debt. *Thomas v. Heathorn* (c), *Everard v. Paterson* (d), *Fulmerston v. Steward* (e).

The Court then called on

Martin. The plea is good on general demurrer. The price of the horse must be taken to be the difference

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(a) 5 B. & Ald. 886.

(b) *Ante*, vol. 3, p. 752, O. S.

(c) 2 B. & C. 477.

(d) 6 Taunt. 625.

(e) Plow. 104, a.

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between 7*l* 2*s*. and 16*l* 12*s*. [*Parke, B.*—It is consistent with the allegations in the plea that the horse was sold for 3*l*., and that, together with the 7*l*. 2*s*., would not amount to the sum mentioned in the bill of exchange: the plea is “which sums, together with the price and value of a horse which the defendant had then sold to Fogo and George,” the sale then must either have been by contract or upon a quantum meruit.] Although it is laid down that the payment of a smaller sum is no satisfaction of a greater, yet that doctrine is confined to payment of money. A chattel of the smallest value may be taken in satisfaction of the largest amount, and a bill of exchange is frequently sold for a smaller sum than appears upon the face of it.

PARKE, B.—You had better amend, and at the same time the plaintiff’s counsel should consider whether he can reply in that form. The common replication de injuriâ puts in issue such matters only as are material to constitute the excuse, but this form of replication puts all matters in issue whether material for that purpose or not.

ALDERSON, GURNEY, and ROLFE, B.’s, concurred.

Amendment accordingly.

one Butler. On the day after the bill became due, the plaintiff sent his son to the defendant (who represented himself to be the holder) with directions to pay the amount and bring it back. The son accordingly paid the amount to the defendant, who refused to give up the bill, but gave a receipt for the money. The plaintiff again sent his son to the defendant, with directions to bring back the bill or the money, but the son returned without either. Subsequently, the defendant sent to the plaintiff the following document:—

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"I hereby acknowledge the receipt of Mr. Strong, of 17L for a bill drawn by Butler, on Mr. Alexander, which I believe to have been lost at my house.

"L. M. GODDARD, Surgeon,

"June, 16, 1841.

"St. John's Wood."

"Further, I undertake to bear Mr. Alexander harmless for the above amount, should the bill be again presented.

"June, 16, 1841.

"L. M. G."

This document the plaintiff retained, and the learned Judge was, therefore, of opinion that the acceptance of Goddard's guarantee was an answer to the action, and directed a nonsuit.

Jervis, having obtained a rule nisi to set aside the nonsuit, on the ground that the defence should have been specially pleaded,

Platt and *Busby* shewed cause, and argued that the acceptance of Goddard's guarantee did not operate by way of accord and satisfaction, and, consequently, that it was not requisite to plead that defence specially. They cited *Hansard v. Robinson* (a), and *Wilson v. Ray* (b).

(a) 7 B. & C. 90.

(b) 10 Adol. & E. 82.

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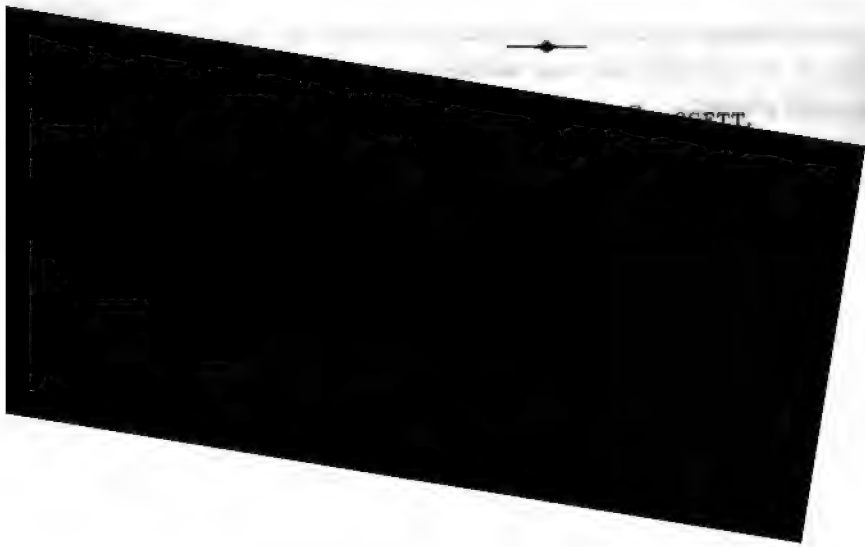
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Jervis, in support of the rule, contended that a right of action having once vested in the plaintiff, any subsequent matter which tended to defeat it should have been pleaded specially. The proposed defence in substance was, that the plaintiff agreed to forego his right of action against the defendant in consideration of Goddard's indemnity.

LORD ABINGER, C. B.—I think the nonsuit was wrong. At one time the plaintiff had a right of action against the defendant, but afterwards he accepts Goddard's indemnity. That was in the nature of an accord and satisfaction in respect of his claim against the defendant, by reason of the latter not returning the money or the bill.

ALDERSON, B.—I am of the same opinion. The plaintiff's son took the receipt without any authority; he is then sent back for the money or the bill, and the defendant refuses to give him either. At that time then a right of action existed. The plaintiff afterwards accepts the indemnity of Goddard, by which he, in effect, agrees to abandon his right of action against the defendant in consideration of such indemnity. That is in the nature of accord and satisfaction, and should have been pleaded specially.

Rule absolute.



factor, to receive and take into his possession certain goods and chattels, to wit, one hundred hogsheads of tobacco of the plaintiffs, and of great value, &c., and that while the said tobacco was in the custody and control of the defendant, he so misconducted himself, that by reason of the misconduct of the defendant, the said tobacco became and was wholly lost to the plaintiffs. The four last counts were similar to the sixth. The defendant pleaded in abatement to the whole declaration, that the goods and chattels in the declaration mentioned were not the property of the plaintiffs alone, but jointly with two other persons; the plea concluded with the usual prayer of judgment of the writ, and that the same be quashed. To this plea the plaintiffs demurred.

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Crompton, in support of the demurrer, was stopped by the Court.

Kelly, *contra*. The plea is undoubtedly good as to the first five counts; and the writ must be quashed so far as relates to the causes of action contained in those counts. The question then is, whether the plea is good as to the five last counts? It is submitted, that those are not counts in contract, but in tort; for if otherwise, they could not be joined with counts in trover. Assuming that these five persons are the joint owners of the goods, if the three who now sue could recover in proportion to their interest in them, the defendant would be subject to another action at the suit of the other two, in respect of their interest. The only mode by which he could protect himself against a multiplicity of suits, is by plea in abatement. *Sedgworth v. Overend* (a). The counts not only allege that the goods were delivered by the three plaintiffs for a particular purpose, but also that they were the property of the three. If then the three persons bring an action to recover the

(a) 7 T. R. 279.

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value of goods to which the five are entitled, can it be said that there is no ground for plea in abatement? In what mode could the damages be assessed at the trial? [Lord Abinger, C. B.—The plaintiffs would be entitled to recover the whole value of the goods. Alderson, B.—The plaintiffs would be trustees for the others jointly interested in the goods]. *Addison v. Overend* (a) is an authority to shew that if one of several part owners of a chattel sue alone, the defendant can only take advantage of the objection by plea in abatement, even though the defect appear on the declaration. But at all events the Court will quash the writ, so far as respects that part of the declaration to which the plea is applicable. In *Powell v. Fullerton* (b), a plea in abatement contained matter, which went in part abatement of the writ only, but concluded with a prayer that the whole writ abate, and the Court held that the writ might be abated in part.

Crompton, contra, referred to *Herries v. Jamieson* (c), where, on a writ in debt for 1066*l.*, the plaintiff declared for 1000*l.* borrowed by defendant of the plaintiff, and in a second count for 66*l.*, for interest of money lent; the defendant pleaded in abatement of the writ, that the said sum of money in the writ mentioned, and thereby supposed to be borrowed from the plaintiff, was borrowed by defendant

not: pleas of this nature must be construed strictly, and the plea being bad as to some of the counts, is bad altogether. In *Powell v. Fullerton*, the plea professed to be pleaded to part of the declaration only, but the concluding part prayed judgment of the writ generally, and a mere defect in the prayer of judgment was held not to vitiate the whole. Besides, that case was in the Common Pleas, where, possibly, the proceedings might have been by original, and, consequently, the nature of all the counts would be stated in the writ. The plaintiff is entitled to judgment of respondeat ouster generally.

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 and Others
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ALDERSON, GURNEY, and ROLFE, B's., concurred.

Judgment of respondeat ouster.

BURGH v. SCHOFIELD.

IN this case, the goods of the defendant having been taken in execution, a third party set up a claim to them, upon which the sheriff applied by summons to a Judge at Chambers for an interpleader rule. The case was heard at Chambers and an order made for an issue to be tried between the claimant and the plaintiff. The claimant afterwards abandoned his claim, whereupon a rule was obtained, calling on the claimant to shew cause why he should not pay the plaintiff's costs of appearance upon the interpleader summons.

Where an interpleader summons under 1 & 2 Vict. c. 45, has been heard by a Judge at Chambers, the Court has no jurisdiction as to costs.

Hayes shewed cause. The Court has no power to grant the application. The second section of the 1 & 2 Vict. c. 45, enacts, "that it shall be lawful for any Judge of the said Courts of Queen's Bench, Common Pleas or Exchequer, with respect to any such process issued out of

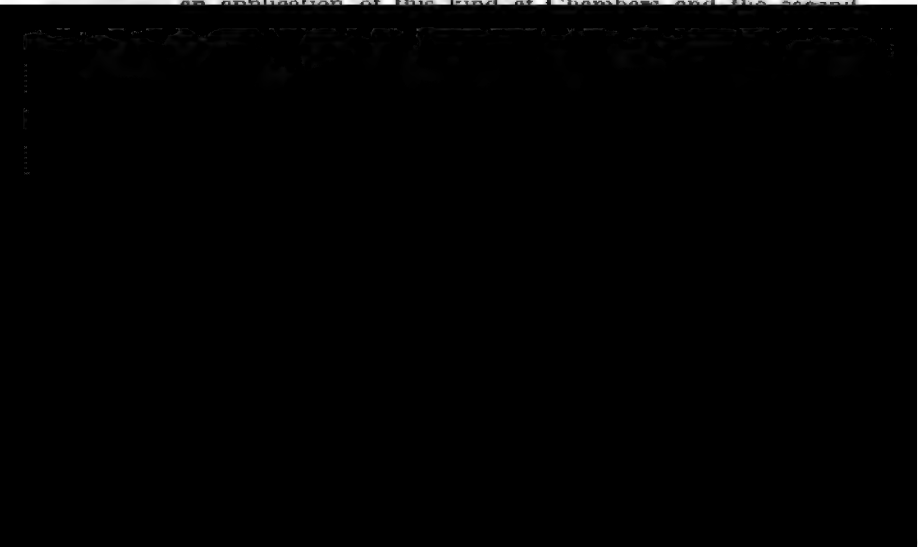
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any of those Courts, to exercise such powers and authorities for the relief and protection of the sheriff or other officer as may, by virtue of the said last mentioned act (1 & 2 Wm. 4, c. 58, s. 6) be exercised by the said several Courts respectively, and to make such order therein as shall appear to be just, and the costs of such proceeding shall be in the discretion of such Judge." The act, therefore, limits to the Judge, who heard the summons, the power to award costs.

Martin, in support of the rule. This is a matter over which the Court has a general jurisdiction, under the 1 & 2 Wm. 4, c. 58, s. 1, and it could never have been the intention of the Legislature to deprive them of that jurisdiction, or the 1 & 2 Vict. c. 45 would have contained express words for that purpose. Under the 1 & 2 Wm. 4, c. 58, the Court has no jurisdiction as to costs of a proceeding which has originated before a Judge, yet the section throughout mentions "the Court or any Judge thereof."

LORD ABINGER, C. B.—I think the act of Parliament has vested the power as to costs in the Judge before whom the summons is heard. The first act did not contemplate an application of this kind at Chambers and the second



the authority to the individual Judge before whom the summons was heard, as such construction might lead to great inconvenience, but I think that where the proceedings have originated before a Judge, the case must be worked out by a Judge.

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 v.
 SCHOFIELD.

ALDERSON and GURNEY, B.'s, concurred.

Rule discharged.

WALKER v. HATTON.

COVENANT. The declaration stated, that by an indenture, bearing date the 10th of May, 1828, J. T. Coward, C. Coward, S. Henley, and E. T., his wife, demised to the plaintiff a certain messuage and premises, with the appurtenances for the term of twenty-one years, from the 25th day of March, then last past, at a yearly rent, &c., and that the plaintiff thereby covenanted with the lessors, that he, the plaintiff, his executors, administrators, and assigns, should and would, at his and their own costs and charges, once, in every three years of the term thereby granted, well and sufficiently paint all the outside wood and iron work of the said messuage and premises, twice in good oil colour; and also once in every seven years of the term thereby granted, well and sufficiently paint all the inside of the said messuage and premises, twice in good oil colour, and also should and would, from time to time, and at all times during the term thereby granted, well and sufficiently repair, uphold, support, maintain, pave, cleanse, empty, amend and keep the said messuage and premises, with the appurtenances, in, by, and with all, and all manner of needful and necessary reparations, cleansings, and amendments whatsoever, (casualties by fire always excepted,) when, where, and as often as need or occasion should be

In an action on a covenant to repair by a leasee against his sub-lessee, the former cannot recover as special damage the costs of defending an action brought against him by his lessor, on account of the same dilapidations.

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or require, and the said messuage and premises being so well and sufficiently repaired, supported, maintained, sustained, painted, paved, cleansed, repaired, amended, and kept as aforesaid, should and would, at the end and expiration of the term thereby granted, or other sooner determination thereof, peaceably and quietly leave, surrender, and yield up unto the lessors, together with all erections and improvements made and added thereon and therein, and all and singular other the fixtures and things mentioned and comprised in the schedule or inventory thereof, thereunder written, in good plight and condition, (reasonable use and wear thereof, and casualties happening by fire to such fixtures in the mean time only excepted); and, further, that it should and might be lawful for the lessors, their heirs, &c., either alone or with workmen, at all reasonable times, in the day time, during the said term, to enter upon any part of the said demised premises, to view, search, and see the state and condition thereof, and upon any such view, that he, the plaintiff, his executors, &c., should and would, upon notice thereof being left at the said demised premises within three calendar months next after any such notice, well and sufficiently repair, amend, and make good, all and every the wants of reparation, whereof any such notice should be given or left as aforesaid, (damage happening by fire excepted as aforesaid). After making proffit

paint, that he did not repair, and that although the original lessors entered upon the premises to view the state of repair, and finding it defective, gave three months' notice of the defects, the defendant omitted, within that period, to repair by reason of which said breaches of covenant by the defendant, the plaintiff afterwards, and before the commencement of this suit, to wit, on, &c., was called upon, and forced and obliged to pay, and did then pay to the original lessors, the sum of 68*l.* for their damages, and 58*l.* 12*s.* for their costs, by them recovered, in an action of covenant which they brought against the plaintiff on account of certain breaches of the covenants entered into by the plaintiffs, with the original lessors in the said indenture firstly mentioned; averment, that the said covenants in the said indenture firstly mentioned, and the said covenants in the said indenture lastly mentioned, have a like force and effect, meaning and purport, and are, in fact, the same, and that the breaches of covenant for and on account of which the original lessors recovered their damages and costs, were the same, and not other than the breaches committed by the defendant, and the plaintiff was called upon, and forced and obliged to pay, and did pay 53*l.* 14*s.* 4*d.* for his costs, by him incurred in and about his defence to the said action. The defendant paid one shilling into Court, and pleaded, that the plaintiff had not sustained damage to any greater amount, upon which issue was joined.

At the trial before *Gurney*, B., at the Sittings in last Easter Term, it was proved that the original lessors in April, 1841, caused the premises to be surveyed, and more than three months before the commencement of the action against the present plaintiff, left upon the premises a notice to repair the dilapidations mentioned in it. The amount of those dilapidations was estimated by the lessors at 200*l.* Upon the commencement of the action against the plaintiff, he caused the premises to be surveyed, and finding them to be dilapidated, applied to the defendant to repair them, and also for instruction as to the course which he should

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pursue with respect to the defence of the action brought against him by the original lessors. The defendant denied that he had been served with any notice to repair, and refused permission to the plaintiff to enter for the purpose of executing the repairs, alleging that the premises did not require them. The plaintiff was desirous of suffering judgment by default, but as the defendant would not consent to that course, or come to any arrangement, the plaintiff served him with a notice; that as he denied that any notice to repair had been served by the original lessors, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned by the original lessors, and try the question, holding the defendant responsible for the costs which he might incur by so doing. The plaintiff accordingly tried the case, and the result was, that the original lessors recovered 68*l.* damages, and 58*l.* 12*s.* costs, and the plaintiff's costs in defending the action, amounted to 53*l.* 14*s.* 4*d.* It was objected, on behalf of the defendant, that the plaintiff could not recover any part of those costs, inasmuch as they were not the necessary consequence of the breach of covenant. The learned Judge overruled the objection, and a verdict was found for the plaintiff, for 180*l.* 6*s.* 4*d.*, leave being reserved to the defendant to move to reduce the damages to 68*l.*

Watts (a), but *Parke*, B., in delivering judgment in the latter case, distinguishes it on the ground that the covenants were not *ad idem*, either in substance or in terms, and observes the dates are different, and under the defendant's contract, the amount of damage is the damage necessarily sustained by the breach of their own covenant; viz., the amount necessary to put the premises in the same state of repair, in which the defendant ought to have kept them. "We were strongly of that opinion when this rule was moved, but upon the case of *Neale v. Wyllie*, we thought it expedient to grant a rule, and if the circumstances had been exactly the same as they were in that case, we should have considered ourselves bound by it, although we cannot help thinking that the Court, on that occasion, had not exactly considered the relation of the parties, and the circumstance that the covenants were not, in terms, the same." This case is analogous to that of a breach of warranty, where the measure of damage is the reasonable consequence of the defendant's breach of contract. In *Lewis v. Peake* (b), the plaintiff recovered as special damage the costs of an action brought against him, by reason of his having warranted a horse sold to him with warranty by the defendant. [*Parke*, B.—That decision proceeded on the ground that the plaintiff was not aware that the warranty was not complied with. In *Wrightup v. Chamberlain* (c), where the plaintiff had the means of knowledge, the result was different.] Here, the plaintiff was misled by the defendant's false statement, that he had not received notice of the dilapidated state of the premises. Besides, as the claim was for unliquidated damages, their amount could not be ascertained unless the case was submitted to a jury.

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Kelly and *Gunning*, in support of the rule. *Penley v. Watts* is precisely in point. In *Neale v. Wyllie*, it did not appear that the plaintiff knew that he had no defence to

(a) 7 M. & W. 601.

(c) 7 Scott, 598.

(b) 7 Taunt. 153.

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the action. In this case, the plaintiff was aware of that fact, and should have suffered judgment by default. Even in the case of a covenant to indemnify, a party is not justified in pleading a plea which he knows to be false. The declaration alleges, that the plaintiff was forced and obliged, and did necessarily pay, lay out, and expend a certain sum of money, but that allegation is not supported by the fact of his having incurred costs, by reason of a defence which he might have avoided. *Wrightup v. Chamberlain* shews that such costs can be recovered only where the party believes that he has a good defence, and such belief has been induced by the defendant. The observations of *Parke, B.*, as to the difference in the date of the covenants is applicable to this case. [*Parke, B.*—The construction of a covenant to repair, is regulated by the state of repair, at the time of executing the lease; here, two years and one month elapse between the two leases.] *Stanley v. Towgood* (a), *Mantz v. Goring* (b), and *Gutteridge v. Munyard* (c), shew, that covenants to repair only impose upon the tenant the duty of keeping the premises in the state in which they were at the time of the demise, so that here one covenant would have reference to the state of repair in 1828, and the other to the state of repair in 1830. This is an attempt to convert a covenant to repair into a covenant of indemnity.

between himself and the original lessor, by the payment of that sum, or he might have paid it into Court. If we were to hold that any more damages were recoverable, it would be difficult to fix the limit, and the only safe rule is, to confine the verdict to such damages as were the necessary result of the act complained of, viz., the want of repair. It cannot be said that the costs of the plaintiff and defendant in the former action were the natural or necessary consequence of the want of repair. I think the case of *Neale v. Wyllie* is not law, and it is better that I should, at once, express that opinion, than attempt to make a distinction between that case and the present, since the making distinctions without any solid foundation only tends to keep up litigation. I concur in the decision in *Penley v. Watts*.

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PARKE, B.—This case is in all four's with that of *Penley v. Watts*, and it seems to me very difficult to support the judgment in *Neale v. Wyllie*. Although the covenant in the present case is, in terms, the same as that contained in the original lease, with the exception of the stipulation as to painting, yet, in substance, the two covenants are different, the leases having been granted at different periods. The law is now well settled that a general covenant to repair must be construed with reference to the state of the premises at the time the covenant began to operate, and as the one lease was granted in the year 1828, and the other in 1830, it is clear that the covenants would substantively vary in their operation. These costs have been unnecessarily incurred, for if the plaintiff had paid the amount of dilapidation into Court they might have been saved.

GURNEY, B.—I am of the same opinion.

ROLFE, B.—The Courts are bound to be careful how they assist parties who do not stipulate for an indemnity.

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Great embarrassment would be created, if we sought to supply what cannot be considered as falling within the natural construction of the language used by them.

Rule absolute.

HICKINBOTHAM v. LEACH.

To an action for slander, charging the plaintiff, a pawnbroker, with the dishonourable practice of "duffing," i. e. replenishing damaged goods and pledging them with other pawnbrokers, the defendant pleaded that the plaintiff did replenish and do up divers damaged goods, and did pledge them with other pawnbrokers.

SLANDER. The declaration alleged that the plaintiff carried on the trade and business of a pawnbroker, and that defendant, intending to injure him in his said trade, charged the plaintiff with committing the unfair and dishonourable practice of "duffing," that is, of replenishing or doing up any goods, being in his hands, in a damaged or worn-out condition, and pledging them with other pawnbrokers.

Plea: that the plaintiff did replenish and do up divers goods, then being in his hands, in a damaged and worn-out condition, and did pledge the said goods with divers other good and worthy subjects of this realm, being pawnbrokers.

Special demurrer, assigning for causes, that it was not stated in or by the plea what goods or what kind of goods, being in a damaged condition, the plaintiff replenished and

the names of the parties to whom the plaintiff has been guilty of "duffing," are peculiarly within his own knowledge. [*Parke, B.*—You might as well say, that if a libel charged a felony, and the plea alleged that the plaintiff had committed certain felonies, such plea would be good, because the plaintiff must know what felonies he had committed.] In *Cornwallis v. Savery* (a), which was an action of debt on bond, the condition was, that the defendant, an agent of a regiment, should pay all money which he should receive from the paymaster-general, and indemnify the plaintiff, the defendant pleaded general performance, and that the plaintiff was not damnified: replication, that defendant received from the paymaster-general several sums of money, amounting in the whole to 1,400*l.*, but that the defendant had not paid them, and it was held, that the breach was sufficiently assigned. *Shum v. Farrington* (b), *Gale v. Reed* (c), and *Barton v. Webb* (d), are to the same effect.

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Erle, in reply, was stopped by the Court.

PARKE, B.—The practice is well established, that in cases of libel and slander, although the charge contained in the libellous matter is general, yet the plea of justification must state specific instances, *J'Anson v. Stuart*, *Newman v. Bailey*, and *Holmes v. Catesby*, are authorities to that effect. I do not mean to say, that in some of those cases, particularly in *Holmes v. Catesby*, the averment was not quite as specific as it ought to be, but it is enough to say, that this plea is not sufficiently precise. It should have stated the manner of replenishing and doing up the goods, and upon what occasions, and also the description of goods, or, at all events, have mentioned the names of the pawn-brokers with whom they were pledged. But here, there is merely a general allegation, that on some occasion, the

(a) 2 Burr. 772.

(b) 1 Bos. & P. 640.

(c) 8 East, 80.

(d) 8 T. R. 459.

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plaintiff pledged some goods with some persons. That is so general, that the plaintiff cannot know what is intended to be charged. With respect to those cases cited, of actions for not accounting, there is, in truth, in those cases, a reason for the exception. The breach is the not accounting for an aggregate sum received, and in order to avoid prolixity of pleading, the law sanctions a departure from the ordinary course, and it is enough to shew that the aggregate sum has not been paid over. That, however, does not apply to cases of defamation.

ALDERSON, B.—No man can answer a plea like this. The object of the plea is to give the party, who is, in truth, an accused person, the means of knowing what are the matters alleged against him. It is said, that he must know them already; it is true, that he knows his own conduct, but he does not know what another means to impute to him. It is because the acts charged against the plaintiff are within the peculiar knowledge of the defendant, that he ought to specify them in his plea.

GURNEY and ROLFE, B.'s, concurred.

Judgment for the Plaintiff.

judgment of the same date. This latter writ was returned by the sheriff. "The defendant is not found in my bailiwick." The venue was laid in the county of Surrey.

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Pigott had obtained a rule, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody, on two grounds; first, on an affidavit that on search in the office, it appeared that no original writ of *capias* had issued into Surrey; and, secondly, that as more than a year had elapsed between the date of the testatum *capias* and its execution, the judgment should have been revived by *scire facias*.

Barstow shewed cause upon an affidavit that an original writ of *capias* had issued into Surrey, tested the same day as the testatum *capias*, and returned *non est inventus*, without any date. That distinguished the case from *Towers v. Newton* (a), where there was no writ into the original county. The circumstance of the two writs bearing teste on the same day would not render them invalid. At all events the Court would, if necessary, allow the plaintiff to amend, by suing out an original *ca. sa.*, to support the testatum, *Newnham v. Law* (b). As to the second objection, the case of *Simpson v. Heath* (c) is in point; there the Court held that a defendant might be taken in execution upon a *ca. sa.* sued out within the year after judgment, though not executed until after the expiration of the year.

Pigott, in support of the rule. Wherever twelve months have elapsed from the last act of record, the presumption of law is that the debt is discharged. [*Parke, B.*—No such

(a) *Ante*, vol. 9, p. 576, O. S.;
1 Q. B. 319.

(c) *Ante*, vol. 7, p. 832, O. S.;
5 M. & W. 631.

(b) 5 T. R. 577.

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presumption can arise from the fact of the defendant not having been found by the sheriff.] The authorities cited in *Bac. Abr.* tit. "*Execution*," (H) shew that this judgment should have been revived by scire facias. [*Parke*, B.—Those cases are only applicable where the plaintiff neglects to take a step, not where he issues his writ, and the sheriff is unable to find the defendant]. In Sir *W. Waller's* case (a), *Mamwood*, C. B., says, "I grant that if one sued forth a writ of execution, and that he continued by vicecomes non misit breve for two or three years, yet the plaintiff may proceed thereon, and not be put to a scire facias, but if such writ be sued forth and not continued, but discontinued by a year and a day, he shall be put to a scire facias; for it is negligence of the plaintiff in not continuing it, which, within the year and a day, he might, without order of the Court, but after the year, not by any order of the Court." [Lord *Abinger*, C. B.—That was so formerly, when writs of execution were returnable on a day certain, but the reason will not apply to the new process]. As to the other objection, it is an established rule that the execution must be warranted by the judgment. Here, the venue having been laid in Surrey, the plaintiff was bound to issue a writ, in the first instance, into that county, and there could be no testatum writ into another until the first writ had been returned non est inventus and filed. Under

it, the ground was, that no irregularity would appear upon the roll. [Lord Abinger, C. B.--Both writs appear to be returned on the same day, non constat, but the original writ was returned before the testatum issued]. *Towers v. Newton* is an authority in point.

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LORD ABINGER, C. B.—Under the old practice, if the party produced an original *ca. sa.*, with the sheriff's return, that was sufficient to warrant the testatum. In this case, the writs may be regularly entered on the roll, and if there are materials to make the roll up, that is enough. The production of the writs with the sheriff's return thereon, is an authority for the officer to make up the roll.

PARKE, B.—We ought to assimilate the new practice to the old, so far as we can, and not interpose difficulties to invalidate writs of this nature. Here we have an original writ of *capias* issued into the proper county, bearing date the same day with the judgment and testatum writ, and returned generally, *non est inventus*, we may, therefore, presume that writ to have been issued and returned on the same day. The plaintiff has, therefore, materials for making up the roll, viz., by a writ of *ca. sa.* issued into Surrey, and returned the same day, *non est inventus*, whereupon, on the same day, the Court award a testatum *ca. sa.* In *Towers v. Newton* that could not be done, because there, the testatum bore date on an earlier day than the original writ, upon which it professed to be founded. With regard to the other point, I have referred to my note of the case of *Simpson v. Heath*, and find that the point was there expressly decided. The reports of that case are incorrect in the date of the arrest; it should be 1839 not 1838. There, the Court decided that a writ of *ca. sa.*, unlike those writs, the duration of which is limited by the Legislature, runs until it is executed. If, indeed, the plaintiff has neglected to take any step until more than twelve months after the

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judgment, the case is different, but if he sues out a writ, it runs until it is executed.

ROLFE, B., concurred.

Rule discharged (a).

(a) See *Thomas v. Harris*, ante, vol. 1, p. 793, N. S.; *Mortimer v. Piggott*, ante, vol. 2, p. 615, O. S.; *Goodtitle d. Murrell v. Badtitle*, ante, vol. 9, p. 1009, O. S.; *Hiscocks v. Kemp*, 3 A. & E. 676.

CRUCKNELL v. TRUEMAN and Another.

The plaintiff has the option, (subject to the discretion of the Court,) of determining whether the issues in law or in fact shall be first decided.

ERIE moved for a rule to shew cause why a demurrer to a plea, going to the whole cause of action, and set down for argument by the defendants, should not be struck out of the paper, and why the defendants should not be restrained from having it argued until after the trial of the issues in fact. He referred to 2 *Wms. Saund.* 300, n. 3, and *Bird v. Higginson* (a), as authorities to shew that the plaintiff had the option of trying the issues in fact first.

W. H. Watson and *Peacock* shewed cause, and argued, that the authorities cited only established that the plaintiff might try the issues in fact first, if the defendant did not set down the demurrer for argument. They referred to 14 *Reg. Gen.*, H. T., 4 *Wm.* 4.

issues in fact, but in this case, as the venue is in London, the proceedings may well go on together.

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ALDERSON, B.—One reason for arguing the demurrer first, is, that after verdict, an amendment cannot be made on arguing the demurrer. The case of *Mortimer v. M'Callan* (a) went to a Court of error, simply because the demurrer was argued after verdict.

Rule accordingly (b).

It was ultimately arranged that the defendants, if judgment were given for them on the demurrer, and the plaintiff would undertake not to bring a writ of error, would withdraw their other pleas, and pay the costs of the issues raised thereon.

(a) 7 M. & W. 20, 9 id. 636.

(b) See *Milton v. Griffiths*, ante, vol. 1, p. 769, N. S.

—◆—
 HORLOCK v. LEDIARD.

THIS was an action of trespass *quare clausum fregit*.

R. V. Richards moved for a rule, calling on the plaintiff to shew cause why he should not deliver to the defendant particulars of the trespasses complained of, and the particular parts and places in which they were alleged to have been committed. The affidavit in support of the application in substance, stated, that the defendant had read a copy of the declaration, and that from the general and vague form thereof, he was unable to ascertain the grievances which the plaintiff intended to rely on; that unless the plaintiff described the same by metes and bounds, and the times, when committed, it would be impossible to plead to the action.

The Court will not order the delivery of particulars in an action of trespass, upon the mere statement of the defendant, that he does not know the grievances intended to be relied on, but some special grounds for the application must be shewn.

PARKE, B.—We always require some special grounds for

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an application of this kind, otherwise in every case of trespass, it would be a step in the cause, to apply for particulars on the affidavit of the defendant, who would never know what the grievances complained of were. There ought to be some special statement of the property, and the Court should see some reasons for granting a rule requiring the delivery of particulars.

Rule refused.

—◆—
TROTTE v. SMITH, Executor.

An application for time to reply, is a waiver of objection to a plea on the ground that is not issuable.

THIS was an action against an executor, on a covenant contained in a mortgage deed, by which the testator covenanted to pay a certain sum of money to the plaintiff, as a trustee for one J. W. ; the breach alleged was the non-payment to the plaintiff or J. W. The defendant, who was under terms of pleading issuably, pleaded first, non est factum ; and, secondly, a plea of the plaintiff's bankruptcy before the commencement of the suit. The plaintiff obtained time to reply, and afterwards signed judgment as for want of a plea. A rule nisi having been obtained to set aside the judgment for irregularity,

Ogle shewed cause. The plea is not issuable, inasmuch

done so, and can it be said that he has that power at any time before trial? If so, he might sign judgment, even after he has replied, and issue is joined.

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PARKE, B.—If the plaintiff had replied to this plea, he certainly could not afterwards have signed judgment, then does he not, by applying for time, admit that there is something to reply to. Can he then say, that the plea ought not to be upon the file at all, by reason of the non-compliance with the Judge's order.

ALDERSON and ROLFE, B.'s concurred.

Rule absolute.

CARR v. ADAMS.

ASSUMPSIT for work and labour, and for money due, on an account stated. The defendant pleaded non-assumpsit, together with other pleas, which are immaterial. At the trial before the under sheriff of Middlesex, the plaintiff, in support of his case, called one Cockling, who upon the voire dire stated that he was employed by the plaintiff to assist him in doing the work in question upon the terms, that "when the plaintiff earned 1*l*., he was to have 8*s*. and the plaintiff 12*s*., that he expected to be paid whether the plaintiff was paid or not, and that he only looked to him for payment, and had nothing to do with the defendant." The witness was thereupon objected to on the part of the defendant, when the plaintiff proposed that his name should be indorsed on the record. The under sheriff was of opinion that such indorsement would not render him competent, and nonsuited the plaintiff.

In an action for work and labour, a person employed by the plaintiff, to assist him, upon the terms that the former should be paid a certain proportion of the amount earned, whether the plaintiff was paid or not, is rendered a competent witness for the plaintiff, by indorsement of his name on the record.

C. C. Jones had obtained a rule nisi to set aside the nonsuit, against which

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O'Malley shewed cause. The 3 & 4 Wm. 4, c. 42, ss. 26, 27, applies only to cases in which the witness is objected to on the ground that the verdict or judgment would be evidence for or against him. But in this case the witness has an interest in the result of the suit wholly independent of the record. He would, in fact, be a partner with the plaintiff in the amount recovered, which would be capable of proof without the production of the record. His evidence would tend to increase the fund out of which he was to be paid, and the greater the amount which the plaintiff might recover, so much the more would be the witnesses' chance of receiving payment of his claim. [*Alderson*, B.—Can it be argued that every creditor is to be rejected on such a ground. The law does not presume that a debtor has not assets to discharge his debts. In *Paull v. Brown* (a), it was ruled that a creditor of a plaintiff is a competent witness for him.] This case resembles that of a copyholder, who is incompetent to prove that a piece of waste land is parcel of a manor.

C. C. Jones, in support of the rule, was stopped by the Court.

Lord ABINGER, C. B.—The witness says, "I am entitled to payment whether the plaintiff is paid or not." he had

get rid of the verdict as evidence, which you do by the indorsement, you get rid of the objection.

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GURNEY and ROLFE, B.'s, concurred.

Rule absolute.

WILLIAMS, Executor of H. R. WILLIAMS, v. GRIFFITH.

THIS was an action by an executor for business done by his testator as an attorney. The testator had brought an action against the defendant on the same bill of costs which was delivered pursuant to the statute, and referred for taxation by a Judge's order. Pending the taxation he died, and the suit having, in consequence, abated, the present action has commenced.

In an action on an attorney's bill by his executor, the Court has no power to refer the bill for taxation, though it contains taxable items.

Jervis had obtained a rule, calling on the plaintiff to shew cause why the bill should not be referred to the Master for taxation, without the usual undertaking, and without prejudice to the defence to the action.

R. V. Richards and *Welsby* shewed cause. The Court has no power to refer a bill for taxation, except in cases in which it can compel its delivery. The two branches of the 2 Geo. 2, c. 23, s. 23, are in this respect correlative. But the executor of an attorney need not deliver a bill because he cannot sign it as required by the statute. It was indeed held, in *Penon v. Johnson* (a), that where an executor did deliver a bill, or where it had been delivered by the testator in his lifetime, it might be referred for taxation, but that case must be considered as overruled by *Doe d. Sabin v. Sabin* (b), which expressly decided that an attorney's

(a) 4 Taunt. 724.

(b) *Ante*, vol. 8, p. 468, O. S.

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bill, delivered by his executor before action brought, is not taxable. In *Williams v. Griffith (a)*, this Court decided, that after action brought on an attorney's bill, containing any taxable item, the Court will refer it for taxation, without the usual undertaking; but that is merely in the exercise of their jurisdiction over their officer.

Jervis, in support of the rule. The case of *Williams v. Griffith* goes to this extent, that if the bill contains any taxable item, the Court has a power, after action brought, to refer it for taxation. The Court having cognizance of the cause, will, in the exercise of its equitable jurisdiction, refer the subject-matter to the proper tribunal. In *Doe d. Sabin v. Sabin*, no action was brought on the bill.

LORD ABINGER, C. B.—The rule must be discharged. We are called upon to carry the principle a step further, by subjecting a party who is not an attorney to the summary jurisdiction of the Court. It would be advisable that parties should consent to refer the bill to taxation, and I cannot think that they would have a better chance with a jury than with the Master.

ALDERSON, B.—To give the Court jurisdiction, two things must concur: the action must be brought on an

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YORK, Assignee of MOODY, an Insolvent Debtor v. BROWN.

TROVER. The declaration alleged that the plaintiff, as assignee of W. Moody, an insolvent debtor, after he became such assignee, was possessed of certain hay, which the defendant converted to his own use. Pleas; first, not guilty; secondly, that the plaintiff was not possessed as such assignee *modo et formâ*.

The recital in an order of adjudication, (under 1 & 2 Vict. c. 110,) of the vesting order is evidence of its date, and that the title of the assignee accrued from that period.

At the trial at the last assizes for the county of Somerset, it appeared the hay in question had been the property of Moody, who alleged that he had sold it to his son, under whom the defendant claimed, and carried it away on the 7th of September, 1841. In order to prove the plaintiff's title as assignee at the time of the conversion, the following documents, under the seal of the Insolvent Court, were put in :—

Seemle, that the recital of the vesting order in the appointment of the creditor's assignee, is not evidence of the date of such order.

“Pursuant to the act for the relief of Insolvent Debtors in England, at a Court held by H. R. Reynolds, Esq., her Majesty's chief commissioner for the relief of insolvent debtors at Wells, in the county of Somerset, on the 24th day of November, 1841, in the matter of W. Moody, a prisoner in the gaol of Ilchester, in the said county. Upon hearing the matters of the schedule of the said prisoner, and upon examination made into the same, and upon the said prisoner's swearing to the truth of the same, and executing a warrant of attorney pursuant to the said act; forasmuch as it appears to the said commissioner that the said prisoner has fraudulently, with intent of diminishing the sum to be divided among his creditors, concealed part of his property, it is adjudged and ordered that the said prisoner shall be discharged from custody, and entitled to the benefit of the said act, as to the several debts and sums of money due on the 24th of August, 1841, being the time of making the order vesting the estate and effects of the said prisoner, pursuant to the statute in that behalf from the said prisoner to the several persons named in the said

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schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons gave credit to the said prisoner before the said time of making such vesting order, and which were not then payable, and as to the claims of all other persons not now known to the said prisoner, who may be indorsees or holders of any negotiable security set forth in the said schedule so sworn to as aforesaid, so soon as the said prisoner shall have been in custody at the suit of one or more of the persons above mentioned, for the period of twelve calendar months, to be computed from the said time of making such vesting order as aforesaid.

(Signed)

“H. R. REYNOLDS,
“Chief Commissioner.”

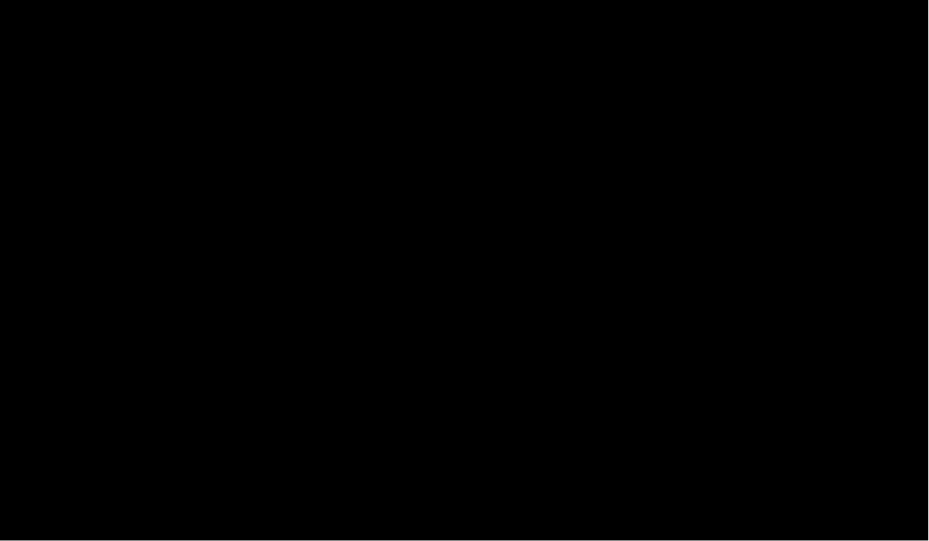
The following certificate was indorsed on the above document:

“26th March, 1842.

“I do hereby certify that this is a true copy of the order of adjudication made in the matter of William Moody.

“EDWARD INGPEN.”

“Deputy to John Massey, chief clerk of the Court for relief of Insolvent Debtors, in whose custody the same now is.”



the said William Moody, for the purpose of the statute.
By the Court.

“Entered of record, acceptance being signified.

(Signed)

“S. STURGIS,

“Provisional Assignee.”

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This latter document was on parchment, but had no certificate indorsed on it. The defendant objected that the second document was not evidence of the appointment of the plaintiff as assignee; and further, if it were, there was no evidence upon the second issue to shew the property to have belonged to him at the time of the conversion, as the recitals in these documents were not evidence of the date of the vesting order, and the conversion, at all events, took place before his appointment as assignee. The learned Judge overruled the objections, but reserved leave to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose.

Erle and *Butt* shewed cause. The documents in question are evidence, not only of the plaintiff's appointment as assignee, but also of the time of such appointment. Although the 46th section of the 1 & 2 Vict. c. 110, makes copies of these appointments, certified in a particular manner, evidence, it does not preclude the production of the original instrument. The only objection is, that it does not come within the 105th section, which directs that the officer of the Court shall, on the request of the prisoner or creditor, provide him with copies of the petition, vesting order, schedule, order of adjudication, or any other order or proceedings, and enacts, that a copy thereof, purporting to be signed by the officer or his deputy, certifying the same to be a true copy, and purporting to be sealed with the seal of the Court, shall be admitted as sufficient evidence of the same, without any other proof. The 45th section enables the Court at any time after the making of the vesting order, to appoint a proper person as assignee,

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and provides, that when such assignee shall have signified to the Court his acceptance of the appointment, the estate, effects, rights, and powers of the prisoner vested in the provisional assignee, shall immediately vest in the said assignee. Under that section, therefore, the creditor's assignee acquires all the rights of the provisional assignee from the time at which the latter acquired them, namely, from the date of the vesting order. The appointment has a retrospective effect similar to the assignment under the old law. *Hepper v. Marshal* (a), *Willes v. Elliott* (b). That being so, the appointment is evidence of the date of the vesting order. [*Alderson, B.*—It is not an essential part of the appointment of the creditor's assignee that he should take from the date of the vesting order.] If that were so, the same observation cannot apply to the recital in the adjudication, for the 75th section expressly directs that the Court is to adjudge the insolvent to be discharged from custody as to the several debts due or claimed to be due at the time of making the vesting order; and by the 76th and 77th sections, if imprisonment be awarded, it must be computed from the same time. The schedule has always been read as evidence of the dates contained in it. [*Alderson, B.*—The time of filing the petition is an essential part of the adjudication, that document, therefore, is evidence of that date.] Here it appears that the title

evidence of the title of the assignee, for by the 45th section it should have been entered of record. Beside, there was not upon it an acceptance by the plaintiff, as also required by that section. The recital in it would not be evidence of the date of the vesting order.

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LORD ABINGER, C. B.—There was evidence of a conversion after the 24th of August, from which period all the right and interest of the insolvent vested in the plaintiff. The Court is empowered to adjudge that the prisoner shall be discharged from all debts due at the time of making the vesting order, therefore the date of the vesting order must necessarily form an essential part of the adjudication. The adjudication is then good proof of it. I agree that the copy of the appointment is not evidence of the vesting order.

ALDERSON, B.—The moment you shew by the adjudication, the date of the vesting order, and the time of filing the petition, the admission on the record that the plaintiff is assignee, decides the matter, because the assignee takes all the personal property of the insolvent from the time of filing the petition, or at all events from the date of the vesting order.

GURNEY and ROLFE, B.'s, concurred.

Rule discharged.

RAWDON and Another, Assignees of WOODHOUSE,
a Bankrupt, v. WENTWORTH, Esq. and SYKES.

TROVER by the assignees of a bankrupt. The defendants pleaded, fourthly, a plea setting forth a judgment To trover by the assignees of a bankrupt, against the sheriff, the latter pleaded a judgment recovered, and execution levied by seizure prior to the fiat, and without notice of any act of bankruptcy. The plaintiffs replied, that the judgment and execution were founded on a warrant of attorney given by the bankrupt by way of fraudulent preference. The rejoinder traversed the fraudulent preference, and issue was found for the defendants: *Held*, that the plaintiffs were entitled to judgment, non obstante veredicto, the record shewing the case to come within sect. 108 of 6 Geo. 4, c. 16.

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recovered on the 10th March, 1841, in this Court, against the bankrupt, by the defendant Sykes, in an action of debt, a fieri facias thereon, directed to the sheriff of Yorkshire, indorsed to levy 181*l*. for debt, &c., and the delivery thereof to the defendant Wentworth, as sheriff of Yorkshire, by virtue of which said writ the defendant Wentworth, so being such sheriff, and the other defendant Sykes, as his servant, and by his command, afterwards and before the date and issuing of the fiat in bankruptcy, against the said Woodhouse, bonâ fide, to wit, on the 29th March, 1841, seized the said goods and chattels in the declaration mentioned, they then being the goods and chattels of the said bankrupt; and, afterwards, to wit, on the same day and year aforesaid, the said defendant, the sheriff, as such, and the said other defendant, as his servant, and by his command, duly sold the said goods and chattels, towards satisfaction of the said debt and damages: that the defendant Sykes, being the person at whose suit, and on whose account the said execution issued, had not, at the time of the executing and levying such execution as aforesaid, notice of any prior act of bankruptcy by the said bankrupt committed: that the said Woodhouse, before the said seizure and sale, had delivered the said goods and chattels to the plaintiffs, and although they were possessed thereof, at the time of the said seizure, no property therein

money borrowed, at the suit of the said Sykes, and thereupon to confess the same action, or else to suffer a judgment by nil dicit, or otherwise, to pass against the said Woodhouse in the same action, to be forthwith entered up against him of record in the said Court, before the Barons of her Majesty's said Exchequer; that the said judgment in the said plea mentioned, and therein alleged to have been recovered by the said Sykes against the said Woodhouse, was had and obtained on the said warrant of attorney, and that the said warrant of attorney, just before the recovering of the said judgment, to wit, on, &c., was given by the said Woodhouse to the said Sykes, by way of a fraudulent preference of the said Sykes. Verification.

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Rejoinder, that the said warrant of attorney in the replication mentioned was not given by Woodhouse to Sykes, by way of a fraudulent preference of the said Sykes, modo et formâ.

At the trial, before *Wightman, J.*, at the Summer Assizes, for Yorkshire, 1841, a verdict was found for the defendants on this issue.

Cresswell, on behalf of the plaintiffs, had obtained a rule nisi for judgment non obstante veredicto, on the ground that it appeared by the replication, and was admitted by the rejoinder, that the execution mentioned in the plea was founded on a warrant of attorney, and as it was not alleged that the sale was antecedent to the issuing of the fiat, the execution was not protected by the 2 & 3 Vict. c. 29, *Whitmore v. Robinson* (a).

Dundas and *Addison* shewed cause, and argued that the pleadings did not necessarily shew a judgment by default, confession, or nil dicit, inasmuch as a party might suffer a judgment to pass against him on demurrer.

Cresswell, W. H. Watson, and Hugh Hill, contra, relied

(a) *Ante*, vol. 1, p. 135, N. S. ; 8 M. & W. 463.

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on *Whitmore v. Robinson*, and argued that a party could not suffer judgment on receipt of a declaration, except by default.

Cur. adv. vult.

The judgment of the Court was now pronounced by

ALDERSON, B.—The only question on which we reserved our judgment in this case, which was argued before my brothers *Gurney* and *Rolfe*, and myself, was, whether we ought to direct judgment to be entered for the plaintiffs, notwithstanding the verdict found for the defendants in the issue, arising out of the fourth plea? By the fourth plea, the defendants justified under a judgment recovered on the 10th of March, 1841, in the Court of Exchequer, a writ of *fieri facias* issued thereon, and a seizure before the fiat in bankruptcy, on which the plaintiffs' title depends. The plea also stated a sale of the goods seized, without adding an averment that the sale was anterior to the fiat, but averred that at the time of the seizure, under the writ of *fieri facias*, Sykes, the execution creditor, had no notice of any prior act of bankruptcy. The replication to this plea stated, that before the said judgment was recovered, the execution debtor made his warrant of attorney, authorizing certain attorneys to appear for him, and to receive a declaration in debt at the suit of Sykes, and thereupon to

cided (and we see no ground to doubt the correctness of that decision,) that an execution levied by seizure before fiat, where the sale is not prior to the fiat, is not, if it be a judgment under a warrant of attorney, any answer to the claim of the assignees. Now here, the plea states a judgment recovered, and an execution levied by seizure prior to the fiat, and without notice of any prior act of bankruptcy, but it does not aver the sale to have taken place before the issuing of the fiat. The replication then adds the facts of the execution of the warrant of attorney, and that the judgment was obtained on it; all these facts are now admitted on the pleadings. It was contended on the argument, that in order to bring the case within the authority of *Whitmore v. Robinson*, the replication ought, as in the pleading in that case, to shew distinctly that the judgment was within the 108th section of the 6 Geo. 4, c. 16. The proviso in the statute extends only to judgments by default, confession, or nil dicit. But here, it is averred in the replication, that the judgment was had and obtained on the warrant of attorney previously stated, and the authority given by that warrant of attorney is confined to confessing such action, and to suffering judgment to pass against the defendants by nil dicit, or otherwise, which, in our opinion, would only authorize a judgment by confession, or by nil dicit, or by some other default. The averment, therefore, that the judgment was recovered on such warrant of attorney, is, we think, equivalent to an averment that it was signed in some of the ways authorized by that warrant, and this must be either by confession, nil dicit, or default. The replication, therefore, does bring the case within the proviso contained in the 6 Geo. 4, c. 16, s. 108: and the case must follow the decision in *Whitmore v. Robinson*. For these reasons, we think there must be judgment for the plaintiffs, non obstante veredicto, on the issue arising out of the fourth plea. The other issues have already found for the plaintiffs.

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Judgment for the Plaintiffs.

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CLEAVER and Another v. FISHER.

Upon a writ of fieri facias, the sheriff's return, that he had seized certain goods which were claimed by a third party, and, thereupon, he applied to the Court, under the Interpleader Act, and an order was made for the trial of an issue, whether the goods were the property of the claimant; that, afterwards, the plaintiff directed him to deliver up possession of the goods to the claimant:
Held, insufficient.

HURLSTONE had obtained a rule to shew cause why the sheriff's return to the mandate of the Chancellor of the county palatine of Lancaster should not be set aside. It appeared from the affidavits that the plaintiff having obtained judgment against the defendant, who resided within the county palatine of Lancaster, had sued out a writ directed to the Chancellor of that county, who had issued his mandate thereon to the sheriff of Lancashire. The Chancellor had been ruled to return the writ, and the sheriff, to return the mandate. The sheriff's return was as follows:—"By virtue of a writ to me directed and delivered, I did, on the seventeenth day of March last, seize certain goods and chattels, which said goods and chattels were claimed by William Murray, in consequence of which I made an application to the Court under the Interpleader Act, and the following order was made on the sixth day of April instant:

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"Upon hearing the attorneys for the plaintiffs, for William Murray, and for the sheriff of Lancashire, I do order that the sheriff do sell the goods seized, and pay the proceeds into Court; that an issue be tried in which the

It was contended that the return was insufficient, as the defendant might, consistently with the facts therein stated, have been possessed, at the time of the levy, of other goods than those claimed by Murray, sufficient to satisfy the execution, and if not, that fact should have been negatived.

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Hugh Hill shewed cause, and urged, that as the plaintiff had appeared upon the interpleader summons, and had afterwards authorized the sheriff to deliver up the goods to the claimant, he was not in a situation to object to the return.

PER CURIAM.—If we were to hold this return sufficient, it would afford great facility for fraud. A defendant would have nothing to do but to get a third party to set up a claim to the goods seized, and if the plaintiff was unwilling to incur the expense of the trial of an issue, the defendant might evade the execution, though he had abundant goods to satisfy the debt. The sheriff may be allowed to amend his return upon payment of costs.

Rule accordingly.

The QUEEN v. The EASTERN COUNTIES RAILWAY
 COMPANY.

A CORONER'S jury summoned to inquire into the cause of the death of one W. Austin, found by their verdict, that on the 18th of August, 1840, a certain railway steam engine, with a train of carriages containing passengers, &c., ran off the line of railway, whereby the engineer of the said engine was hurt, and the boiler exploded, in consequence

Four coroner's inquisitions found that the deaths of four persons were respectively caused on a certain day, by a steam engine, and each inquisition im-

posed on the engine a deodand of 125*l*. The deodands having been estreated into this Court, under the 3 & 4 Wm. 4, c. 99, s. 29, the Court refused to stay proceedings on three of the inquisitions, on payment of 125*l*., on the ground that the instrument moving to the death of the party could not be twice forfeited for the same accident, but left the parties to their remedy, by traversing or setting aside the inquisition.

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whereof the said W. Austin was scalded and burnt, and received injury, of which he afterwards died; and that so the said W. Austin, in the manner aforesaid, accidentally, casually, and by misfortune, came by his death, and that the said steam engine was moving to the death of the said W. Austin, and was then, (that is, at the time of the inquest,) of the value of 125*l.*, and was then the property and in the possession of the Eastern Counties Railway. There were three other inquisitions by the same jury, on three other persons, which were in precisely the same form, and each imposed a deodand of the same amount. These four deodands having been estreated into this Court, in pursuance of the provisions of the 3 & 4 Wm. 4, c. 99, s. 29.

Cresswell, on the part of the Railway Company, had obtained a rule, calling on the *Attorney General* to shew cause why, on payment of one sum of 125*l.*, in satisfaction of one of the above inquisitions, all further proceedings to levy the rest should not be staid. The affidavits in support of the rule stated, that the several persons in the several inquisitions named, had met their deaths by one and the same accident, and that the engine, &c., in all the inquests mentioned, was the same, and that the engine having been once forfeited in respect of that accident, and a deodand imposed, could not be forfeited a second time in respect of

Cooling, in support of the rule. The rule of law is, that when an instrument at one time, or on one day, causes the death of several persons, one deodand only is payable in respect of all. On the same principle it was held in *Crepps v. Durden* (a), that a person can commit but one offence on the same day, by exercising his ordinary calling on a Sunday, contrary to the 29 Car. 2, c. 27, and that if a justice of the peace proceed to convict him in more than one penalty in respect of the same day, it is an excess of jurisdiction, for which an action of trespass will lie, even before the convictions are quashed. Had the Crown proceeded in the old common law mode, by process on the inquisitions, the defendants might have traversed them, but where, as in the present case, the deodands are estreated into this Court, a defendant has no other mode of relief, but by applying to its equitable jurisdiction.

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LORD ABINGER, C. B.—The rule must be discharged. We have no right to travel out of the inquisitions according to the terms of which the Crown is entitled, either to four engines, or four sums of 125*l.* each. The moment you go beyond that, you are endeavouring to explain the record by extrinsic evidence.

ALDERSON, B.—The day is no essential part of the finding, therefore the inquisitions are consistent with the supposition, that the deaths occurred on different days, and by different engines. It is, however, said, that this is an application to our equitable jurisdiction, but if we travel out of the record, we must go out of it on one side as well as the other. It is in the power of the company to redeem the whole sum of 500*l.* by giving up the engine, and if they ask us for equity, they must begin by doing equity themselves.

(a) Cowp. 640.

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GURNEY, B.—The proper course for the defendants to pursue, is either to traverse the inquisition, or else move the Court of Queen's Bench to quash it.

Rule discharged.

The Mayor, Aldermen, and Burgesses of the Borough of
CARMARTHEN v. EVANS and Others.

A challenge to the array or the polls should be entered at the time on the Nisi Prius record; together with the grounds of it.

ASSUMPSIT for rent payable in respect of the use and occupation of market stalls and premises, together with the tolls. The corporation of Carmarthen were the plaintiffs, and the venue was laid in the county of the borough of Carmarthen. The defendant, Evans, pleaded non assumpsit, and the other defendants suffered judgment by default. The cause came on for trial before *Alderson*, B., at the last Spring Assizes, when the defendant Evans challenged the array, on the ground that the sheriff who returned the jury-panel was a member of the corporation, and also challenged the polls, on the ground that each jurymen called was also a member. The learned Judge overruled the challenges, whereupon the counsel for the defendant Evans declined to appear and conduct the defence. The challenge, however, was not entered on the record. The

that "every challenge, either to the array or to the polls, ought to be propounded in such a way that it may be put at the time upon the nisi prius record, and so particular were they in early times, when challenges were more in use, that it was made a question in 27 Hen. 8, 13 (B.), pl. 38, whether it was not a fatal defect to omit the concluding it with an 'et hoc paratus est verificare,' and it was because many precedents were shewn without such a conclusion, and the justices did not choose to depart from the precedents, that it was held unnecessary." The reason assigned is, that the other party may have an opportunity to demur or counterplead. After quoting several instances in which the objections had been put upon the record, Lord *Tenterden* proceeds to observe: "the challenges therefore, ought, in this case, to have been put upon the record, and the defendants are not in a condition, in strictness, to ask of the Court an opinion upon their sufficiency." If the defendant, in this case, imagined that he could not have a fair trial by a jury from the borough, he might have moved to change the venue.

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J. Evans, in support of the rule. This case is distinguishable from that cited, because here, the objection appears by the panel annexed to the record. It resembles *Goodright v. Williams* (a), in which the Court arrested the judgment, on the ground that an action of ejectment for lands in Cardiganshire appeared upon the record to have been tried in Shropshire instead of Herefordshire, as the nearest English county. But if it was otherwise, the reason which formerly prevailed for putting a challenge upon the record has been superseded by the modern practice of granting a new trial. Lord *Tenterden*, in *The King v. Edmonds*, after the observations which have been quoted, goes on to say: "but notwithstanding this defect of form (namely, the omitting to put the challenge

(a) 2 M. & Sel. 270.

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on the record), on the part of the defendant, the Court has taken into consideration the validity of these challenges, and it is upon the ground of their invalidity, not on the defect of form, that we think this rule ought to be refused." From that, it clearly appears that the Court will entertain an objection of this kind upon motion. It is argued, that if the defendant thought he could not have a fair trial, he should have moved to change the venue, but it is sufficient to say that it was the plaintiff's duty to do that. They might have suggested the fact of the sheriff being a corporator, and have procured the venue to be awarded to the coroner or elisors. Lord *Coke* thus lays it down (*a*): "If the defendant may have a principal cause of challenge to the array, if the sheriff return the jury, the plaintiff, in that case, for his own expedition, may allege the same, and pray process to the coroners, which he cannot have unless the defendant will confess it. But if the defendant will not confess it, then the plaintiff shall have a *venire facias* to the sheriff, and that defendant shall never take any challenge for that cause, and so in like cases. But on the part of the defendant, any such matter shall not be alleged, and process prayed to the coroners, because he may challenge the jury, and can be at no prejudice." [*Parke*, B.—How can it be said that the corporators are the real parties to the action; the money would not go into their pockets?]

sarily be members of the corporation. As to the interest of the jury in the result of the suit, that is also uncertain, for it is possible that they might not possess any property upon which a rate could be made. At all events the matters of objection urged, are only ground of challenge, and whether or no they would have been considered valid, had they been put upon the record in due form, it is unnecessary now to determine, for the probability is, that in such case the Judge would have ordered a new panel, or the cause might not have been tried at all. The defendant must have been aware of the objections from the very first, and should have applied to change the venue, which is the simplest and cheapest operation. The defendant's object has evidently been to put the parties to expense, and he deserves no indulgence, and although if the omission to make the entry on the record had arisen from the inadvertence of counsel, or the defendant had been misled by the dictum of the Judge at nisi prius, we might have granted a new trial, and changed the venue, yet that could only have been done on an affidavit of merits, which are not suggested, and on payment of costs.

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PARKE, B.—The sheriff was not necessarily incompetent to summon the jury, nor the jury to try the cause, for it is possible that not one of them might have been a member of the corporation, or even an inhabitant within the borough.

GURNEY and ROLFE, B.'s, concurred.

Rule discharged.



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LEAF and Another v. TUTON.

In assumpsit
for goods sold
and delivered,
a plea of 29
Car. 2, c. 3,
s. 17, bad,
as an argu-
mentative de-
nial of the
facts alleged
in the decla-
ration.

ASSUMPSIT for goods sold and delivered, and for money due on an account stated. Plea, as to the sum of 35*l.* 8*s.* 6*d.*, parcel of the monies in the first count mentioned; the defendant says, that at the time when he became indebted to the plaintiffs in the manner in the said first count mentioned, he became indebted to them so far as relates to the said sum of 35*l.* 8*s.* 6*d.* upon one entire contract then made between the plaintiffs and the defendant, for the sale of parcel of the said goods in the said first count mentioned, for a price and value exceeding 10*l.*, to wit, for the price and value of the said sum of 35*l.* 8*s.* 6*d.*, and that the defendant being the buyer thereof, did not accept and actually receive the said goods in this plea mentioned, parcel, &c., or any part thereof; nor did he give or pay anything in earnest to bind the bargain so constituted by the said contract, or in part of payment of or for the same goods, or any part thereof, nor was any note or memorandum in writing of the said bargain made and signed by the defendant, being the party to be charged by such conduct, or by his agent thereunto lawfully appointed. Verification:

Special demurrer, assigning for causes that the plea was

stance sets up the defence that the Statute of Frauds (29 Car. 2, c. 3), has not been complied with. Several cases have decided that such defence may be given in evidence under the general issue. *Buttmer v. Hayes* (a), *Johnson v. Dodgson* (b), *Elliott v. Thomas* (c). [*Parke*, B.—In *Maggs v. Ames* (d), the Court held that a plea that the defendant's undertaking was for the default of another without writing, and without consideration, might be pleaded, although such facts could have been given in evidence under the general issue]. In that case it was doubtful whether or no the plea amounted to the general issue, and the judgment of the Court proceeded on the ground that it was one of many instances in which a defendant had the option of giving his defence in evidence, or of putting it on the record. In *Lilley v. Hewitt*, a contrary doctrine was laid down, and the Court held such plea bad, notwithstanding the case of *Saunders v. Wakefield* (e), and *Wood*, B., in delivering judgment says, "amongst the ancient lawyers such a style of pleading would never have been thought of, and I am sure that no such plea was ever put in practice on any occasion from the 29th of Charles 2, when the Statute of Frauds and Perjuries was made, down to the second year of his present Majesty, which is a strong proof that former lawyers never thought that such a plea could be supported." [*Alderson*, B.—Does not the defendant by this plea in plain language say, "I was indebted to you, the plaintiff, upon a contract for 500*l.*, but the requisites of the statute have not been complied with, and, therefore, you cannot enforce the contract against me?" My difficulty in saying that the plea amounts to the general issue arises from the circumstance that it admits the debt. *Parke*, B.—The plea is a denial that the defendant was ever liable].

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(a) *Ante*, vol. 7, p. 489, O. S. ;
5 M. & W. 456.
(b) 2 M. & W. 653.

(c) 3 M. & W. 170.
(d) 4 Bing. 470.
(e) 4 B. & Ald. 595.

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Hoggins, contra. The plea admits the contract and the promise as alleged, but avoids the liability by extrinsic matter. The defendant in fact says, "I admit that the goods were sold and delivered to me, but the provisions of the statute have not been complied with." It is no objection to a special plea that it amounts to the general issue, provided it confesses and avoids the plaintiffs' cause of action, or contains matter of law. In *Carr v. Hinchliff* (a), *Bayley, J.*, says, "There are instances in which a defendant has the option of giving his defence in evidence under the general issue, or of putting it on the record. One of those is, where the plaintiff's right of action is confessed and avoided by matter ex post facto, ex gr. by a plea of payment, as in *Brown v. Cornish* (b), and *Vanhatton v. Morse* (c), or accord and satisfaction, as in *Paramore v. Johnson* (d), where the reason is assigned, viz. that it gives colour to the plaintiff. The other instance is, where the plea does not deny the declaration, but answers it by matter of law." [*Parke, B.*—The plea in that case was not a denial of the contract, but was founded on matter which the defendant might or might not choose to insist upon as a defence]. This is clearly a case of a party availing himself of a matter of law, which the authorities referred to shew that he may plead. He also cited *Lysaght v. Walker* (e), *Barnett v. Glasson* (f), *Hanson v. Armitage* (g).

exist between this case and those in which a *primâ facie* liability is admitted, as in pleas of infancy, coverture and the like, is this: that in these latter, the contract is *primâ facie* good, and the defence is, that the defendant is exempted on the ground of some *personal* disability, but on the contrary in the case of the Statute of Frauds, the defendant relies on the statute rendering the contract null in its inception, and affecting all persons generally.

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Cur adv. vult.

The judgment of the Court was delivered by

PARKE, B.—The question in this case was, whether a plea under the 17th section of the 29 Car. 2, c. 3, was good on special demurrer. Under the new rules the plea of the general issue in actions of *assumpsit* operates as a denial, in fact, of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law; and the case of *Buttner v. Hayes*, in this Court, decided that it amounts to a denial that the requisites under the Statute of Frauds to the validity of a contract have been complied with in cases where that statute is applicable, and that it is for the plaintiff to shew affirmatively that the provisions of that act have been complied with. This being so, the pleading those provisions is nothing more than an argumentative denial of the contract, or of the facts from which it is implied by law, and is, therefore, demurrable, as amounting to the general issue within the very words of the new rules. There is a material distinction between this case and those where the contract is rendered void either by common or statute law, in consequence of some matter which, admitting a colourable right of action in the plaintiff, becomes the subject of proof by the defendant, as for instance, usury, fraud, gaming, infancy, coverture, &c. Such do not amount to a denial of the contract, but are a defence by way of confession and avoidance, and, consequently, according to the express provisions of the New

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Rules, require to be specially pleaded. Under the old system, all these latter defences were *admissible in evidence* under the general issue, because that form of plea, as then understood, had not the limited effect it has now of denying the allegation in the declaration, and was equivalent to saying that the plaintiff had no cause of action, or if he had, that it had ceased previous to the commencement of the suit; but they did not amount to the general issue, *i. e.*, to an argumentative denial of the facts alleged in the declaration as the foundation of the plaintiff's right to recover. The case of *Maggs v. Ames*, which was referred to in the argument, was, we think, decided without sufficiently adverting to this distinction, at all events, it cannot be upheld since the decision in this Court of *Buttmer v. Hayes*, which has received the confirmation of the Court of Queen's Bench in the subsequent case of *Eastwood v. Kenyon*. Our judgment, therefore, must be for the plaintiff.

Judgment for the Plaintiff.

OWEN and DIXON v. SCALES.

A bill signed ASSUMPSIT on an attorney's bill. The defendant

At the trial before Lord *Abinger*, C. B., it appeared that the business in question had been done by the firm of Owen and Dixon. In the year 1840, Owen went to reside in Australia, and Dixon became a member of another firm, but there was no evidence of a formal dissolution of the partnership. Some time after Owen left England, a bill was delivered to the defendant, which was headed "To Owen and Dixon," and was signed at the foot thus :

"This is our bill,

" For Self and Robert Owen,

" JAMES H. DIXON."

The signature was in the handwriting of Dixon. It was objected that the signature was not a sufficient compliance with the statute; first, on the ground that there was no evidence of any authority to Dixon to sign for Owen, a bill which would bind him as to the items, and might make him liable to the costs of taxation, if more than one-sixth were taken off. Secondly, that if Dixon had such authority, the form of signature was insufficient, as he should have signed Owen's name as well as his own. Leave having been reserved to move to enter a nonsuit,

Crowder obtained a rule nisi accordingly, against which

Erle and *Creasy* shewed cause. As there was no evidence of a dissolution of partnership between Owen and Dixon, the simple question is, whether this signature by one member of a firm is a sufficient compliance with the requisites of the 2 Geo. 2, c. 23, s. 23. That statute enacts, "that no attorney of the Courts of Queen's Bench, &c., nor any solicitor in Chancery, &c., shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party to be charged therewith, or left for him at his dwelling-house, &c., a bill of such fees, &c., which bill

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shall be subscribed with the proper hand of such attorney or solicitor," &c. There are several authorities to shew that a literal compliance with these words is unnecessary. In *Colling v. Treweek* (a), the Court held that an attorney's bill was in the nature of a notice; the object of the statute was to give the party notice that unless the bill was paid an action would be brought, and also to give him an opportunity of taxing the bill, if he should object to the items. If the notice be so explicit as not to mislead, it is a compliance with the statute. In *Smith v. Brown* (b), a bill signed by one of two attorneys in the name of the firm "Smith and Jago," was held sufficient. It is clear that one partner has authority to sign for all, *Wilks v. Back* (c). Now, if the surnames alone of the members of a firm be sufficient, à fortiori, their full names must be. In the case of *James v. Swift* (d), a notice previous to action brought against a justice of the peace, and which was signed only with the surname and initials of the Christian names of the plaintiff's attorneys, was held sufficient.

Crowder and *Hurlstone*, in support of the rule. The onus lay on the plaintiff of proving the second issue, namely, that a bill under the proper hand of the attorney had been delivered before action brought. The word "proper" which is so used in the statute, has, in law, a tech-

attorney or agent shall sign it, and does not require that it shall be signed by the party's proper hand. It is true that *Smith v. Brown*, is an authority to shew that the signing of the partnership name is a sufficient compliance with the statute, but that decision proceeds on the ground that a man may have a partnership name as well as a Christian and surname, and, therefore, a signature in such name is the proper signature of the attorneys.

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LORD ABINGER, C. B.—This rule must be discharged. Undoubtedly, if we were to follow the precise words of the act of Parliament, we should be compelled to decide otherwise; but in so doing we should extend its construction to a length which it would be impossible to carry out in practice. The act in terms requires his bill to be signed with the proper hand of the attorney. If that is to be taken literally, then in every case where an attorney might happen to die before delivering his bill, the amount could never be recovered by his personal representative (a). Again, supposing a firm consisting of several partners, if one of them should chance to be abroad when the work was done and should not return to this country until the expiration of six years from that time; if the strict construction of the statute is to prevail, the right of the whole firm to recover compensation for their labour, would be barred by the Statute of Limitations. That surely never could have been the intention of the framers of this act; and, accordingly, the case of *Smith v. Brown* is an express authority to shew that it is not necessary, in the case of a partnership between attorneys, that a bill delivered for work done by them as such, should be signed with the hands of each of them, but that a signature by one in the partnership name is a sufficient compliance with the statute. The simple question before us, therefore is, whether if one

(a) The executor of a deceased attorney need not deliver a bill. *Barret v. Moss*, 1 C. & P. 3, and see *Penson v. Johnson*, 4 Taunt. *Williams v. Griffith*, ante, p. 281; 724.

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partner signs his own Christian and surname, and the same for his partner, that is not equally so? We have arrived at this, that the hand of one of several partners is the proper hand to sign the bill; and the question is, whether he is bound to sign it with the name of the firm to the exclusion of the Christian and surnames of the several partners of it? I do not see why if he can do the one, he is not equally authorized to do the other, or why his adding the Christian names should have the effect of invalidating the document. I think, therefore, that under all the circumstances of the case, this signature was sufficient. If the bill had been signed by the plaintiffs "Owen and Dixon," it clearly would have been, and the insertion of the Christian name does not render it otherwise.

PARKE, B.—I am of the same opinion. The suggestion that the partnership was dissolved being unsupported by the evidence, the simple question is, whether this signature by one of these partners for himself and the other, is a sufficient signing of the names of these attorneys to their bill within the meaning of 2 Geo. 2, c. 23, s. 23? Now, in the case which has been referred to of *Smith v. Brown*, the question raised was, whether the using the name of the partnership firm was a sufficient naming of the attorneys within the stat. 3 Jac. 1, c. 7, s. 1, and a sufficient signing

the two parties composing such a firm subscribes his proper hand to the bill, in such a manner as to shew that the bill is not delivered as his own, merely but of himself and his partner, such a signing is within the act, and that is the present case. The object of the statute was to ensure the delivery of a bill signed by the principal, or by one partner where there are several principals, in contradistinction to its being signed by a clerk or servant. In this point of view we have here the bill under the hand of one of two partners, shewing it is to be a partnership bill, delivered in respect of a partnership account, and as such a sufficient signing within the intention of the statute.

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GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. The issue joined on the record is, was this bill signed by the proper hand of the plaintiff? And the question is, what is a good signature of the names of a firm? Now, the case which has been cited of *Smith v. Brown*, is sufficient to shew that the signature by one partner of the common name is the signature of all the members within the meaning of the statute. Here, the plaintiff signs for himself and his partner, stating the Christian and surnames of both; and it is sufficient to decide this case, to say that the only matter in issue was, whether this bill was signed by the proper hand of the plaintiffs, when it was only signed by one partner? That, on the authority of *Smith v. Brown*, is the signature of both.

Rule discharged.



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COTTON v. SAWYER.

A description of the defendant in a writ of summons, as "R. S., of the city of London," is insufficient, and in such case, the application may be to set aside the service and copy of the writ.

HOGGINS had obtained a rule nisi to set aside the service and copy of a writ of summons for irregularity, on the ground that the defendant was described in it as Richard Sawyer, of the city of London.

Martin shewed cause upon affidavits, which stated that defendant had formerly resided within the city of London, but had given up his house some time before the issuing of the writ, and had no permanent place of abode there, though he occasionally came to the Bull Inn, Aldgate, where he was served with the copy of the writ. He contended that the act of Parliament ought to receive a reasonable construction, and that under these circumstances the description was sufficient. Besides, the form of the rule was wrong; the defect, if any, was in the writ itself, and not in the copy or service. In *Hall v. Redington (a)*, an application to set aside the copy of a writ was considered nugatory.

Hoggins, in support of the rule, was stopped by the Court.

fore irregular, and there is no use in keeping up the service when the copy is gone.

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ALDERSON, B.—It is an irregular writ.

Rule absolute, without costs.

YARDLEY v. ARNOLD.

IN this case the defendant was sued as executor de son tort, for a debt due from his deceased father, whose goods the defendant had taken possession of under a bill of sale, which, it was contended by the plaintiff, was fraudulent and void. The defendant pleaded *plenè administravit*, except as to 2*l* 1*9s* 6*d*., which he paid into Court, and also a plea of payment of 1*1l* by the deceased, upon which pleas issues were joined.

A person entitled to a distributive share of the effects of an intestate, is not a competent witness on behalf of a person sued as his representative.

An objection to the competency of a witness, taken after he is sworn, but before any question put to him, is not too late.

At the trial before *Parke*, B., the defendant called the widow of the deceased as a witness, to prove the execution of the bill of sale. Upon her examination on the *voire dire*, she stated that her husband had left no will. She was then sworn in chief, but before any question was put to her, the plaintiff's counsel objected that her testimony was inadmissible, as, being the widow of the intestate she was entitled to a distributive share of his effects after the payment of debts, and, consequently, had a direct interest in the event of the suit. The defendant's counsel submitted that the objection was made too late, and that it was not well founded; he also proposed to indorse the witness's name on the record under the 3 & 4 Wm. 4, c. 42. The learned Judge held, that such indorsement would not render the witness competent, and refused to admit her evidence. A verdict having been found for the plaintiff,

R. V. Richards moved for a new trial, and urged, first,

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that after the witness was sworn, it was too late to object to her competency: secondly, that the witness was competent. The object of her testimony was to set up a deed which would deprive her of any share in the effects of the deceased. She, therefore, came to diminish, not to augment the fund. Objections on the score of interest depend upon the influence which the evidence the party is called upon to give may be reasonably supposed to exercise over his mind. In this case, the witness knew that it would be to her prejudice to establish the deed. Besides, the question was not simply whether the assets of the intestate were to be made available, but whether the defendant was liable as executor de son tort. *Nowell v. Davies* (a) decided that in an action against executors for a debt of the testator, a person entitled to an annuity under the will, is not disqualified by interest from giving evidence for the defendants. *Bloor v. Davies* (b), which would seem an authority to the contrary, is distinguishable, because there, the real estate upon which the witness's legacy was charged, would be necessarily affected, because the action was not against the executor, but the devisee.

Lord ABINGER, C. B.—In my opinion, the witness was incompetent, because, in the event of a verdict against the defendant, her share of the assets would be propor-



upholding it is, that the estate of the testator must be presumed to be solvent until the contrary be shewn; besides, that was the case of an annuitant, which is distinguishable from that of a residuary legatee, for the interest of the latter must necessarily be reduced by any claim which it is the object of the action to enforce. The case of *Bloor v. Davies* was decided upon that ground, and we had recently occasion to consider the subject of the competency of a legatee in *Burghart v. Hall (a)*. I then attempted to support the case of *Nowell v. Davies* against the opinion of my Brothers, on the ground which I have mentioned, but we all agreed that a residuary legatee, or a person entitled to a distributive share, could not be a competent witness.

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PARKE, B.—I am of the same opinion. The question of the competency of this witness turns upon her statement on the *voire dire*, that she was the widow of the deceased, and that he had left no will. Under those circumstances, I think that on the ground of interest she was not a competent witness on behalf of this defendant, who was sued as the representative of the deceased. There may be two objections against a witness on the score of interest, the one is, where the verdict in the cause would be evidence for or against him; the other is, where the witness has an interest in the event of the suit, independently of any use which might be made of the verdict. If, in the present instance, the objection to the witness rested solely on the first ground, it might have been cured by an indorsement on the record, in the mode pointed out by the statute. That, however, is not the case here, for the witness had a direct interest in the event of the suit, which expression I understand to import that some immediate and necessary consequence, either beneficial or prejudicial to the witness, will arise from the verdict. That would be so here, for the verdict and judgment would form a charge upon the

(a) 4 M. & W. 727.

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assets of the intestate, and diminish the fund, which the witness would be entitled to share. She had, therefore, a direct interest in the result. It was argued that she was competent, because the object for which she was called, was to shew that these goods formed no portion of the assets to which she was entitled to share. That argument is founded on the fallacy of mixing up the subject of interest in the event of a suit, with the particular question which may happen to be litigated. When a witness is first called, it is impossible for the Judge to tell what questions may be put to him, or what evidence he may be brought to give ; all that the Judge can do in deciding upon his competency, is to look at the event of the cause, and consider whether or no the witness may be affected by it. The case of *Nowell v. Davies* is no authority to shew that the witness has not an interest in the event of the suit. That case was lately considered by us, in *Burghart v. Hall*, and there was a difference of opinion between the Lord Chief Baron and ourselves respecting it. We thought it was not law, and the only ground on which it was supported was, that the insolvency of the estate of a deceased person ought not to be presumed. Even that ground fails here, for it cannot apply to a person entitled to a distributive share of an intestate's property, for such person stands in the situation of a residuary legatee. With respect to the time at which the

the existence of an instrument which prevented these goods from becoming assets of the intestate, and so extinguished her interest in them. The true question, however, is, whether, on her examination on the *voire dire*, she appeared to be incompetent in the cause, not what would be her testimony or its result, for you cannot render a witness competent by saying that he shall not be asked any question which may affect his interest. Even supposing that might have been done in this case, still the difficulty would not have been removed, for, the witness would nevertheless be interested in the questions proposed to be put to her, since proof of the deed would only go to shew, that when the assets came to be distributed, something in the nature of an estoppel, operating against her as to part, might possibly be set up.

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Rule refused.

COOMBS, Administratrix, *v.* NOAD.

DETINUE by the plaintiff, as administratrix of John Coombs, for certain goods and chattels, to wit, 1,000 yards of broad-cloth, and two pieces of other cloth, the property of the intestate.

The defendant pleaded, secondly; that the intestate delivered to the defendant the said goods and chattels in the declaration mentioned, to wit, the said cloths, to be by him, in the way of his trade, milled and prepared, for certain reward, and on the terms, that the price and value of the work to be done by the defendant in milling and preparing the said cloths, should be paid upon the completion of the milling and preparing of the said cloths, and that the defendant should have a lien on the said cloths for the price and value aforesaid, and be entitled to detain the same as a security for the payment of such price and value to the defendant: that the defendant received the said cloths upon

To a declaration in detinue for 1,000 yards of broad-cloth, and two pieces of other cloth, the defendant pleaded that the said cloths were delivered to him to be milled, and that he detained them as a lien for the price. It appeared that eight pieces of cloth had been originally delivered to the defendant, six of which he had re-delivered: *Held*, that the plea only applied to the two pieces detained.

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those terms, and milled and prepared them; and that the reasonable price and value of the said work, therefore, payable to the defendant, amounted to a large sum of money, to wit, to the sum of 15*l.*, which money remaining due, the defendant detained, and still did detain, the said cloths, as such lien and security for its payment.

Replication: that after the milling and preparing the said cloths, the plaintiff tendered and offered to pay to the defendant the sum of 10*s.*, parcel of the said sum of 15*l.*, being the price and value of the work done by the defendant, in milling and preparing the said cloths, which the defendant refused to accept, and as to the residue of the said sum of 15*l.*, that the said sum of 10*s.*, and no more, was the reasonable price and value of the work in the plea mentioned, and the only sum due and owing to the defendant in respect thereof, at the time of the detention.

Rejoinder: that the price and value of the milling and preparing the said cloths, was a sum of money greater than the said sum of 10*s.*, to wit, the sum of 15*l.*, without this, that the said sum of 10*s.*, and no more, was the price and value of the milling and preparing of the said cloths, modo et formâ. Upon which issue was joined.

At the trial before *Erskine, J.*, it appeared that the intestate had delivered to the defendant at the one time eight pieces of cloth to full, six of these pieces had been

the defendant, reserving leave to the defendant to prove to enter a nonsuit.

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Erle having obtained a rule nisi for that purpose,

Barstow shewed cause. The contract being entire, the defendant was justified in detaining any portion of the goods for the whole sum due, *Ford v. Baynton (a)*, *Blake v. Nicholson (b)*. Under the form of declaration, the plaintiff might have recovered in respect of the whole eight pieces; the plea confesses the claim set up, and in answer, shews a lien. The plea is not confined to the two pieces detained, but is equally general with the declaration. The defendant had no means of ascertaining precisely the subject-matter of the plaintiff's complaint. Suppose, at any time, the defendant had refused to deliver up the whole eight pieces, and had afterwards given up the six, he could only meet that case by this general form of plea.

Erle and *Bere*, in support of the rule, were stopped by the Court.

LORD ABINGER, C. B.—The plea only applies to the goods actually detained by the defendant. Now, before action brought, he had delivered up to the plaintiff six out of the eight pieces, therefore, he rests his justification on the detention of the two, only, and as the amount of his lien on them was tendered, the plaintiff is entitled to recover on the issue. If the defendant intended to insist upon a lien for fulling other cloths, he should have mentioned them in his plea.

ALDERSON, GURNEY, and ROLFE, B.'s, concurred.

Rule absolute.

(a) *Ante*, vol. 1, p. 357, O. S.

(b) 3 M. & Sel. 167.

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HARRISON v. MATTHEWS.

Debt will not lie against one of several covenantors on a covenant by them, or some or one of them, to pay a sum of money.

DEBT. The declaration stated that by a certain indenture, made between J. Hartley of the first part, the defendant of the second part, W. Ashcroft the elder, of the third part, W. Ashcroft, the younger, of the fourth part, and the plaintiff, of the fifth part, the defendant covenanted with the plaintiff, that they, the defendant, the said J. H., W. A., the elder, and W. A., the younger, their heirs, &c., or some, or one of them, should or would pay, or cause to be paid to the plaintiff, his executors, &c., 300*L.*, and interest: Breach, that defendant did not, nor did the said J. H., W. A., the elder, and W. A., the younger, or any or either of them, or any other person, pay the said sum of 300*L.*, and interest on, &c.

Special demurrer, assigning for cause, that the covenant being collateral, an action of debt would not lie upon it.

Erle, in support of the demurrer. The covenant is a collateral undertaking to pay, if the other persons do not, and it does not appear that those persons executed the indenture: the form of action, therefore, should have been covenant, and not debt. *Randall v. Rigby* (*a*) will govern this case: there, it was decided, that debt could not be

other persons are also bound. In *Randall v. Rigby*, the money was, in the first instance, to be taken out of the land; and the covenant was founded on a privity collateral to the land; but, in this case, though several persons are bound, each is under an absolute undertaking to pay the joint debt. [*Alderson*, B.—If that were so, it would be a sufficient breach to allege, in the declaration, that defendant alone did not pay. In *Evans v. Jones*, such an averment would have been enough. But here, if you strike out of the declaration that the others did not pay, it would be consistent with the fact that the plaintiff had received payment from them.] The duty is not the less direct, because it is in the alternative.

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Erle, in reply. The covenant is, in effect, that if the other parties named do not pay, the plaintiff will. It is, therefore, conditional. In *Vin. Abr.* tit. "*Debt*," (D.) pl. 3, it is said, that debt will not lie if the covenant is conditional, as thus; viz. that if C. do not pay to B. 10*l.* then A. will pay it.

Cur. adv. vult.

The judgment of the Court was delivered by

PARKE, B.—In this case, the Court intimated a desire that the parties should amend, and we understand that they refuse to do so. It was an action of debt, and the declaration stated, that by a certain indenture made between James Hartley, of the first part, W. Ashcroft, the elder, of the second part, W. Ashcroft, the younger, of the third part, the defendant of the fourth part, and the plaintiff of the fifth part, by which said indenture the defendant covenanted with the plaintiff, his executors, &c., that they, the defendant, the said James Hartley, W. Ashcroft, the elder, W. Ashcroft, the younger, their heirs, executors, and administrators, or some, or one of them, should or would pay, or cause to be paid, to the plaintiff, his executors, &c., the sum of 300*l.*, with interest, on the 24th of December then next. To this count, there was a demurrer, and then a common

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count, on which issue was joined. The causes of demurrer assigned, are, that in the declaration the plaintiffs have complained against the defendant in an action of debt, for the breach of the covenant by the defendant mentioned in the declaration, whereas it appears, by the declaration, that the defendant covenants that he and other persons, their heirs, executors, &c., or some or one of them, shall pay, or cause to be paid, the monies in the declaration mentioned, which said covenant entered into, as far as regards the other persons, is a collateral covenant, and, therefore, the action ought to have been in covenant, and not in debt. The Court, feeling very great doubt whether the action of debt was maintainable on the facts stated in the first count, desired the plaintiff to amend, thinking it probable, indeed, there appears to be no doubt, from the knowledge we have of the other paper book, in an action against the other parties to the indenture, that the indenture was really executed by Hartley and the two Ashcrofts, as well as by the defendant, and that all four covenanted to pay the sum of 300*l.*, in which case an action of debt would undoubtedly have lain against the four, and against one, if the one sued should not plead in abatement. The plaintiff having declined to amend, we are now to pronounce the judgment of the Court on the record as it stands. It is well settled, that if there be a covenant by the defendant that he will

the act be not done, debt lies not, but covenant only." If the law, as expressly laid down, is correctly laid down in the authorities, and we think it is, it appears to us to warrant a judgment for the defendant. In this case, we cannot assume that Hartly and the two Ashcrofts executed the indenture, (that is, upon the facts stated in the record,) or that, if they did, they covenanted jointly with the defendant to pay the sum of 300*l*., or that there was any recital in the indenture, which recital would have bound the defendant thus to pay; as, for instance, if the 300*l*. were advanced to, or was a joint debt of the defendant, Hartley, and the two Ashcrofts. We must deal with the case as if the legal effect of the covenant were properly set out in the declaration, and we may treat the question as if it had arisen nakedly on a covenant by the defendant, that he, and J. S., a stranger, or a number of persons, for the number is immaterial, their heirs, executors, administrators, or assigns, would pay the sum of 300*l*. on a certain day. This seems to us to be the same as if the defendant had covenanted that he or J. S., or that J. S. or he, would pay that sum on that day, and is to be governed by the principle of the authorities above referred to. It is, in substance and effect, the same as a covenant to pay, if J. S. does not; and then an action of debt will not lie. Our judgment must, therefore, be for the defendant, which we are sorry to give, because, on the facts appearing on the other paper book, there seems no doubt that the plaintiff might have framed his declaration so as to recover judgment from the defendant in all the three actions.

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Judgment for Defendant.



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PRATT v. DELARUE.

A pauper is exempt from the payment of interlocutory as well as final costs, except in cases within 1 Reg. Gen., H. T., 2 Wm. 4, s. 110, for not proceeding to trial pursuant to notice.

IN this case the action was commenced on the 6th of October, and on the 15th of the same month the plaintiff was admitted to sue in formâ pauperis. An order was subsequently made by Lord Abinger, C. B., allowing the defendant a month's time to plead. The plaintiff took out a summons to rescind that order, and, upon hearing the parties, Rolfe, B., ordered that the summons "be refused, with costs to be taxed by the Master, and paid by the plaintiff."

Horn had obtained a rule to shew cause why the order of *Rolfe*, B., should not be amended, by striking out the words "with costs to be taxed by the Master, and paid by the plaintiff," and why all subsequent proceedings should not be set aside with costs.

Otter shewed cause. The question is, whether a pauper can in any case be compelled to pay costs? The Statute of Gloucester gave costs to plaintiffs in all cases in which they recovered damages, and that act embraced as well the Court fees as fees to counsel and attorney, and other costs in the cause. The 11 Hen. 7, c. 12, was passed to exempt

writing of the same writs to write the same ready to be sealed, and also learned counsel and attorneys for the same without any reward taking therefore; and after the said writ or writs be returned, if it be afore the King in his Bench, the justices there shall assign to the same poor person or persons counsel learned by their discretions which shall give their counsels nothing taking for the same; and likewise the justices shall appoint attorney and attorneys for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made which shall do their duties without any reward for their counsel's help and business in the same." At the time that statute passed a defendant was not entitled to costs though he succeeded, but the subsequent act of the 23 Hen. 8, c. 15, s. 1, gave defendant costs upon a verdict or nonsuit in all actions in which a plaintiff would be entitled to them if he recovered. The second section exempts paupers admitted at the commencement of the suit from the payment of any costs by virtue and force of that statute. [*Parke, B.*—The question is, whether a pauper can be made to pay interlocutory costs. The rule has certainly been not to make a pauper pay any costs whether interlocutory or final, but to dispauper him. The rule of Hilary Term, 2 Wm. 4, pl. 110, enabled the Courts to inflict costs upon a pauper in certain cases instead of dispaupering him.] It is undoubtedly laid down in the books, that a pauper is not bound to pay costs in any case, but no satisfactory reason is given. In 1 *Equity Cases*, *Abr.* 125, and 3 *Blac. Com.* 400, it is said "that a pauper may recover costs though he pays none, for the counsel and clerks are bound to give their labour to him but not to his antagonist," a reason which seems to apply to final rather than interlocutory costs. In *Brunt v. Wardell* (a), *Maule, J.*, observes, "that the statute does not say generally that every poor person who shall be admitted to

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(a) *Ante*, vol. 1, p. 229, N. S.; S. C. 4 Scott, N. R. 188.

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have his process and counsel of charity shall be delivered from costs, but every poor person admitted at the commencement of the suit." He also referred to *Rice v. Brown* (a), *Blood v. Lee* (b), and *Casey v. Tomlin* (c).

Horn, in support of the rule. The uniform practice has been to exempt paupers from the payment of costs without distinction between interlocutory and final. This practice has existed for centuries, and the Court will not disturb it merely because the language of ancient statutes, if strictly criticised, will not support the practice to the letter. Before the rule of 2 Wm. 4, the mode of punishing a pauper was by dispaupering him, and the power given to the Court by that rule of inflicting costs in certain cases shews, in the opinion of the framers of the rule, that such power did not exist before. *Casey v. Tomlin* shews that the admission of a pauper to sue after the commencement of the suit, makes no difference as to his exemption from the payment of costs. But, admitting that a pauper may be compelled to pay interlocutory costs, he ought at least by analogy to the rule of Hilary Term, 2 Wm. 4, to be called upon by rule, to shew cause why he should not pay them.

Lord ABINGER, C. B.—I think it clear, upon the words of the statute of 23 Hen. 8, that a person admitted to sue

mon Pleas. It is not for us to overrule so solemn a decision. The question, therefore, now is, not whether or no a pauper can be made to pay interlocutory costs, but what the practice has been. The rule will be absolute without costs, for setting aside so much of my brother *Rolfe's* order as directs the plaintiff to pay costs.

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PARKE, B.—It seems to me that the question has nothing to do with the construction of the statute, which applies solely to costs as between party and party. This is a case of interlocutory costs, and stands upon an entirely different footing. The practice has been long settled, that a pauper pays no costs whatever, and the principle doubtless was, that it would be a great wrong to oblige a person to pay costs who was totally destitute of money. This practice I think we cannot overturn. Then the rule of Court has been made, which directs, “that where a pauper omits to proceed to trial, pursuant to a notice or undertaking, he may be called upon, by a rule, to shew cause why he should not pay costs, though he has not been dispaupered,” and a question arises, whether that rule has so far altered the practice, as to subject a pauper to pay interlocutory costs, or whether it is to be restricted to the solitary instance mentioned. I think we ought to confine it to that instance, and that until some rule be made by which a pauper can be compelled to pay interlocutory costs, we ought not to sanction that part of this order.

GURNEY, B. concurred.

ROLFE, B.—When I made the order, I certainly was not apprised that the plaintiff was a pauper, or I should not have made it. At the same time, I regret that there is no jurisdiction to inflict on a pauper interlocutory costs, for although the non-payment of costs by a pauper has a popular sound, and, in many cases is extremely proper, yet it is very often made the means of gross oppression. In

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the present case, for instance, the plaintiff has chosen to summon the defendant three times to Chambers. But as the practice has been not to inflict costs, it is not fit that an alteration in the practice should be made by a Judge at Chambers.

Rule absolute, without costs.

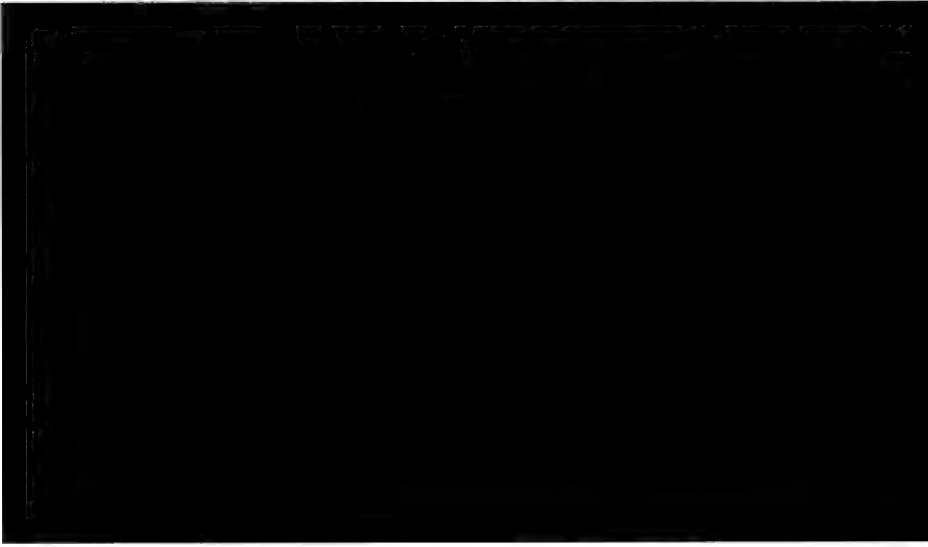
JUDGMENT AS IN CASE OF A NONSUIT.

Directions to the Officers of the Court respecting the time for moving for judgment as in case of a nonsuit.

ALDERSON, B., handed to the officers of the Court the following directions, and stated that they were settled by the Court, after conference with the Judges of the Court of Common Pleas, respecting the case of *Higgins v. Stanley (a)*, which had been erroneously reported.

IN TOWN CASES.

Issue joined in, or in Vacation, before any Term, a motion for judgment as in case of a nonsuit, may be made in the second Term next after. Thus, issue joined in, or in Vacation before Hilary Term, motion may be made in



COURT OF QUEEN'S BENCH.

Michaelmas Term.

IN THE FIFTH YEAR OF THE REIGN OF VICTORIA.

Doe dem. MOODY v. SQUIRE.

1842.

A RULE had been obtained on behalf of the lessor of the plaintiff in this action, calling upon the defendant to shew cause why he should not pay to the lessor of the plaintiff, or his attorney, the sum of 439*l.* 14*s.* 8*d.*, with interest, at the rate of 5*l.* per cent. on 200*l.*, parcel thereof, from the 1st September, 1841. It appeared that there had been two actions between the parties, in one of which, Moody was the lessor of the plaintiff, and Squire the defendant; and in the other, Squire was plaintiff, and Moody defendant. Both causes were referred to arbitration, and on the 1st September, 1841, an award was made, directing, amongst other things, the payment to Moody, by Squire, on the 25th January, 1842, of the sum of 200*l.*, with interest, and also certain costs, amounting to 239*l.* 14*s.* 8*d.* The object of the present rule was to give the finding of the arbitrator the effect of a judgment, under the 1 & 2 Vict. c. 110, s. 18.

Upon a rule calling upon a defendant to shew cause, why he should not pay a sum of money awarded against him under a reference of a suit to arbitration, the Court made the rule absolute, though the forms of service required under the old practice on motions for attachments had not been pursued.

The arbitrator made his award on the 1st of September, 1841, directing payment on the 25th of January, 1842, of a certain sum "with interest:" *Held,*

Wordsworth shewed cause. Before the recent act, a party had the option of proceeding to procure the enforce-

that under that award, upon a rule under 1 & 2 Vict. c. 110, s. 18, the plaintiff could recover no interest accruing subsequently to the 25th of January.

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ment of an award, either by action, or by attachment; but if he selected the latter summary mode of recovering the amount due, he could only proceed after the formal demand of performance of the award, and after personal service on the party on whom such performance rested, of a copy of the award, and rule of Court by which the reference was directed. (*a*) These formalities, in the present instance, had not been pursued, and it was submitted, that as this was a proceeding similar in its character to a motion for an attachment, the Court would not without those formalities summarily call upon Mr. Squire to pay the money now demanded. It might be doubtful whether, since the 1 & 2 Vict. c. 110, the Court would grant an attachment at all, for non-performance of an award; and if that were so, the argument that a party sought to be charged with the payment of a certain sum of money should have proper notice of the demand, received confirmation and support. [*Wightman, J.*—An attachment is in the nature of a penalty against a man for not obeying that which is, in effect, the order of the Court; this rule, however, is not of the same character. By this rule, it is only sought to give the award the value and effect of a judgment. It may be, that an attachment will, in future, be unnecessary for practical purposes. I think enough is done in obtaining this rule, without going through the forms which were necessary in

Therefore, all that could be recovered, under this rule, was that which was given by the award.

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Whitehurst, in support of the rule. From *Jones v. Williams* (a), it appeared that the right mode of proceeding had been adopted here. There, under an agreement of reference, a sum was awarded to be paid by plaintiff to defendant, and the agreement was afterwards made a rule of Court; it was held, that the defendant could not, by virtue of the rule of Court, issue execution for the sum awarded under the 1 & 2 Vict. c. 110, s. 18; that clause being applicable, for that purpose only, where the money payable by the rule, is expressed in the rule itself. Lord Denman, C. J., there said, "there is no difficulty in giving effect to the act of Parliament as to awards, if a proper case is made out, and that is, by calling on the delinquent party to shew cause why he should not pay a certain sum of money, pursuant to the award. If that rule be made absolute, an execution may issue for the sum distinctly specified in the rule so to be obtained." Secondly, the arbitrator had expressly awarded the sum of 200*l.*, "with interest," and those words must apply to the principal money, whenever it should be paid.

WIGHTMAN, J.—This rule must be made absolute, but without costs. With regard to the second point, the award is only for the payment of the money due on a certain day, with interest to that day. Beyond that day you cannot recover any interest under the award; though a jury might give it.

Rule absolute, without costs.

(a) 11 Ad. & El. 175.



1842.

DOE dem. NEVILLE and Another v. LLOYD.

An affidavit in an action of ejectment, intituled, "John Doe on the demise or demises of R. D. N., and W. L. v. E. L., is bad, and a rule to set aside a judgment having been obtained on such an affidavit, the lessor of the plaintiff was held to be entitled to discharge it, but without costs.

P*ASHLEY* shewed cause against a rule obtained on behalf of the defendant in this suit, for setting aside the judgment, and all subsequent proceedings. He objected to the title of the affidavit on which the rule had been moved. It purported to be sworn in a cause of "John Doe, on the demise or demises of Richard Daniel Neville, Esq., and Walter Lloyd, v. Evan Lloyd." The cause was, "John Doe, on the several demises, &c." He urged that upon this ground the rule must be discharged, with costs.

Sir *John Bayley*, in support of the rule. It was a technical objection, and the Court would not, at all events, discharge the rule with costs.

Pashley referred to *Shaw v. Perkin* (a), where, upon an objection to the jurat of an affidavit, the rule was discharged with costs; and also to a case of *Frost v. Heywood* (b), which had occurred in the Court of Exchequer on the previous day, whereupon, on an objection of the same character, a like course was taken. In *Blackwell v. Allen* (c), the Court of Exchequer had distinctly said, upon an objection to an affidavit, that the jurat was without date.

1842.

JAMIESON v. WILKINS.

C. C. JONES moved for a *distringas*. There had been three calls and two appointments, and it was sworn, that it was believed that the defendant was keeping out of the way to avoid service; the peculiarity of the case was, that two of the calls had been made on the same day, pursuant to the appointment of the deponent. [*Patteson, J.*—That will not do; I have always understood the distinction to be, that if you called at one part of the day, and then learned that the defendant could be seen at a subsequent period of the same day, and so, in fact, the appointment came from the defendant, and two calls were thus made in one day, that would do; but that if the appointment came from the person serving the writ, the case was different.] In *White v. Western* (a) it was held that the attempts to serve a summons in order to obtain a *distringas*, may be made in the same day, if it appear that the defendant is purposely keeping out of the way.

This Court will not grant a *distringas*, where three calls and two appointments having been made, two of the calls being on one day, the appointments being those of the party seeking to serve the writ: *Semble*, that if an appointment came from the defendant, a second call on the same day, in pursuance of such appointment would, in such a case, be sufficient.

PATTESON, J.—It will not do: in this Court the practice is, that two calls shall not be allowed on the same day, except under the circumstances which I have described.

Rule refused (b).

(a) *Ante*, vol. 2, p. 451, O. S.

(b) The case of *White v. Western*, above referred to, was decided by *Parke, J.* It is supported by the subsequent decisions of *Littledale, J.*, in *Hickman v. Dallimore*, *ante*, vol. 4, p. 278, O. S., where it was held, that a *distringas* may be taken, although three calls and two appointments have not been made, if it appear that the defendant is keeping out of the way to avoid service; of the Court of Common Pleas, in *Gale v. Winks*,

ante, vol. 5, p. 348, O. S.; in *Webb v. Jenkins*, *ante*, vol. 7, p. 135, O. S.; and in *Mills v. Boulbee*, *ante*, vol. 1, p. 707, N. S.; Vide also *Memorandum*, (in the Exchequer,) *ante*, vol. 9, p. 728, O. S.; and the case of *Tapping v. Greenway*, *ante*, vol. 1, p. 408, N. S. The authority of these decisions is controverted by *Cross v. Wilkins*, *ante*, vol. 4, p. 279, O. S.; and *Clayton v. Marsham*, *ante*, vol. 5, p. 542, O. S.; both in this Court.

1842.

LUXFORD v. GROOMBRIDGE.

A deponent, who describes himself as "agent of the above-named plaintiff in this cause," sufficiently complies with 1 Reg. Gen., H. T., 2 Wm. 4, s. 5, which requires that the addition of every person making an affidavit, shall be inserted therein.

PASHLEY shewed cause against a rule nisi to compute, obtained by *G. T. White*. He objected to the affidavit on which the rule nisi had been moved: it purported to be the affidavit of William Austen "agent of the above named plaintiff in this cause." This he urged was not a sufficient compliance with the rule of Hil. T., 2 Wm. 4 (*a*), which requires "that the addition of every person making an affidavit shall be inserted therein." The description of a deponent as "agent of the plaintiff," was an insufficient compliance with this rule, for it might be that he was merely an agent in London, for conducting the plaintiff's mercantile business. The rule of Court was intended to carry out the objects of the Statute of Additions, 1 Hen. 5, c. 5, and under that statute, such a description of a party would have been clearly bad. He cited, *Daniels v. May* (*b*), *Jarrett v. Dillon* (*c*), *Bro. Abr.* tit. "Addition," pl. 42, 2 *Hawk.* c. 23, s. 112.

G. T. White, in support of the rule. The term "agent," was one which was in daily use in the profession, and was constantly recognised and well understood. The meaning of the addition which was given here, was that the de-

PATTESON, J.—The words used, “agent to the above named plaintiff in this cause,” would fairly mean agent in this cause to the above named plaintiff. I am told by the officers of the Court that affidavits are constantly made in this form. I am not disposed to get rid of the practice, and I think the affidavit will do.

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The rule was made absolute.

Doe dem. DOBLER v. ROE.

RAMSHAY moved for judgment against the casual ejector. The affidavit stated that on the 25th of May, in the present year, service of the declaration and notice had been effected on a servant of the tenant in possession, on the premises in question in the cause, and that the servant had promised to convey the papers which were left, to his master. On the 16th of November, the deponent had again gone to the premises, but he found them deserted, and falling to decay. It was submitted, that under these circumstances the Court would grant a rule nisi, and would direct that service by attaching the rule to the premises, should be deemed good service.

Where service in ejectment had been effected on the servant of the tenant on the premises, who promised to convey the papers which were left with him to his master, and the premises were subsequently found to be deserted, the Court refused to grant even a rule nisi for judgment against the casual ejector.

WIGHTMAN, J.—There must be some probable cause for supposing that the declaration comes to the hands of the tenant. Here all that has been done, has been to serve the servant, and even he makes no subsequent acknowledgment or declaration that he has told his master. The desertion of the premises is nothing. You have not done sufficient.

Rule refused.

1842.

JAMES v. LAURIE.

Where a writ of distringas is executed, and the sheriff returns nulla bona, the plaintiff is entitled to an order to enter an appearance, although the case is not distinctly referred to by the statute, 2 Wm. 4, c. 39, s. 3.

FORTESCUE moved for leave to enter an appearance for the defendant, after the service of a writ of distringas. It appeared that the sheriff had served the writ, and had made a return of nulla bona. This case did not appear to fall within the words of the statute, 2 Wm. 4, c. 39, s. 3, which applied to cases of the return of nulla bona and non est inventus, but it was submitted that it must be taken to be within its meaning.

PATTESON, J.—It is certainly safer for you to apply in such a case. You are, however, entitled to your order; for the case falls within the act.

Order granted. (a)

(a) Vide *Jones v. Dyer ante*, vol. 2, p. 445, O. S.

Doe dem. EVANS v. ROE.

Where the son-in-law of the

THOMAS moved for judgment against the casual ejector. Service of the declaration and notice had been

1842.

ALDERLEY v. STOREY.

ALFRED AUSTIN moved for a rule for the costs of the day for not proceeding to trial pursuant to notice.

Cause cannot be shewn in the first instance against a rule for costs of the day, for not proceeding to trial pursuant to notice, although notice of the motion has been given.

Whigham appeared to shew cause in the first instance, the plaintiff having been served with notice of this motion. [*Wightman*, J.—This is a motion of course, and cause cannot be shewn.] 'The plaintiff was prepared, upon affidavit, to shew that the defendant ought not to have any costs, and it was a saving of expense to come at once to the Court to shew cause (*a*).

WIGHTMAN, J.—The practice of the Court is to grant this rule in the terms in which it is made, and the effect of doing so is simply to send it before the Master, who is to say whether there are any costs due or not. The Master is to determine what costs are to be allowed: if his determination is erroneous, you will come to the Court. In this case the rule must go.

Rule accordingly.

(*a*) Vide Chit. Arch. 1068.

REGINA v. ROWLEY.

GRAY had obtained a rule, calling upon the prosecutor of the information in this case to shew cause why, on the

An information having been tried at the Summer Assizes.

sizes, the defendant tendered a bill of exceptions to the learned Judge, and on the day after the trial supplied him with a sketch of the exceptions: On the 3rd of November, the defendant furnished the prosecutor with a draft of the bill of exceptions for his approval; on the 5th of November, the draft being still in the hands of the prosecutor, the defendant moved for a rule to restrain the prosecutor from proceeding on his judgment, until one week after the bill of exceptions had been sealed; on the 7th of November, (the fifth day of Term,) the prosecutor signed judgment: *Held*, that the defendant had been sufficiently prompt in his proceedings, and that he was entitled to a reasonable time to seal his bill of exceptions and to sue out a writ of error, and the Court refused to compel him to pay the costs of the application, but directed them to be costs in the cause; or to impose a term upon him to enter the fact upon the record, that the bill of exceptions was sealed after judgment signed.

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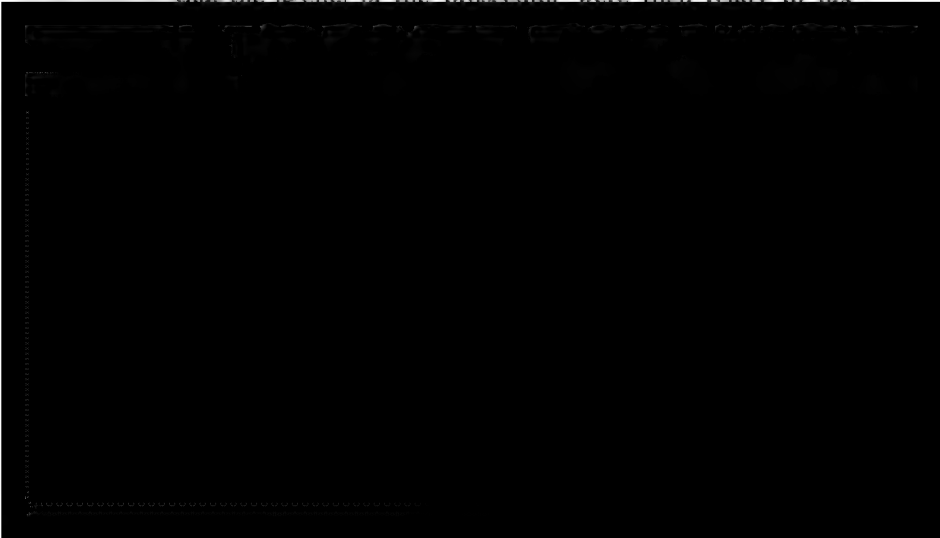
REGINA

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defendant undertaking to proceed to get the bill of exceptions sealed, he (the prosecutor,) should not be restrained from proceeding further than signing judgment against the defendant, until one week after the bill of exceptions should have been so sealed. The rule had been moved upon an affidavit that the defendant was a town councillor of the borough of Litchfield, and that an information, in the nature of a quo warranto, having been exhibited against him for acting in the execution of that office, it was tried before *Tindal*, C. J., at the last Summer Assizes for the county of Lincoln, and a verdict was returned for the Crown. A bill of exceptions was tendered to the direction of the learned Judge to the jury, and on the day after the trial a sketch of the exceptions was handed to his Lordship: a draft of the bill having been prepared and settled by the counsel of the defendant, a copy thereof was served on the agents of the prosecutor, on the 3rd of November. This application was made on Saturday, the 5th of November, at which time, the draft of the bill of exceptions had not been returned.

R. V. Richards now shewed cause. He produced affidavits, which stated that the present rule was not served until seven o'clock on the evening of the 5th of November, that the agents of the prosecutor were then ready to tax



Gray, contra. It was no objection to this application that the judgment had been already signed. The bill of exceptions formed no part of the judgment; it was tacked to the record after the judgment was signed, and the record was so taken up to the Court of Error. In *Dillon v. Doe* dem. *Parker* (a), a bill of exceptions was tendered, but the jury found for the defendant in error, and he entered up judgment in the term succeeding the trial; the plaintiff in error immediately removed the cause into the Court of Exchequer Chamber by writ of error, but could not agree with the defendant in error as to the terms of the bill of exceptions, so that the Judge's signature was never obtained. On a rule to shew cause why the defendant in error should not be compelled to settle the bill of exceptions, and why it should not be appended to the writ of error, it was held that the plaintiff in error had waived his bill of exceptions, by bringing a writ of error before the bill of exceptions was signed. That case shewed, therefore, that the fact of the judgment being signed, did not operate as a waiver of the bill of exceptions. *Willans v. Taylor* (b), was also an authority in favour of this application. There, the defendant sent the plaintiff a copy of the bill of exceptions, in order that he might concur in the statement of facts, and at the same time sued out a writ of error, and the Court of Common Pleas held, that the plaintiff had no right to retain the bill of exceptions, in order to frustrate the writ of error, on the ground that the defendant had waived it by suing out such writ. And where the defendant, below, tendered a bill of exceptions, and afterwards brought error, the bill of exceptions not being ready when the writ was returned, the Court, on the consideration of the circumstances, allowed it to be tacked to the record afterwards. *Taylor v. Willans* (c). Those cases were also in point to shew that the

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(a) 1 Bing. 17; 11 Price, 100, 257, S. C.
S. C.

(c) 2 B. & Ad. 845.

(b) 6 Bing. 512; 4 M. & P.

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delay which had here taken place in settling the bill of exceptions was immaterial. In strictness, the defendant might have procured his bill of exceptions to be sealed by the learned Judge without tendering it for the approval of the prosecutor; and he was ready to do this on the 3rd of November; and if he had done so, the objection now raised, that the judgment had been signed, would not apply. With regard to the lapse of time, it was further to be observed, that during the long Vacation, the defendant would have had great difficulty in obtaining the settlement of the bill of exceptions by counsel, and he had shewn himself prepared to proceed with his writ of error on the second day of Term. This was, besides, not an application to stay the entering of judgment, for there could be no doubt that the prosecutor was entitled to enter his judgment on the fifth day of Term; but only to stay proceedings on the judgment after it had been entered for a reasonable time, within which the defendant might sue out his writ of error in proper form. [*Patteson, J.*—What strikes me, is, that this is rather an application quia timet.] The defendant was driven to apply to the Court, because, if he allowed the prosecutor to proceed at once upon the judgment, he would go on to obtain a peremptory mandamus for a new election in the room of the defendant, to which the defendant could offer no opposition. The de-

entitled to a reasonable time to complete his bill of exceptions in order to bring a writ of error, before the prosecutor takes any further steps. The present rule must, therefore, be made absolute, and the prosecutor must return the draft of the bill of exceptions as quickly as possible. I do not think that the defendant should pay the costs, as it is prayed by *Mr. Richards*, because, if he had waited until the prosecutor had obtained a peremptory mandamus, it would have been too late for him to get his bill of exceptions sealed, and to obtain a writ of error.

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R. V. Richards urged that the defendant might have tendered his draft of the bill of exceptions to the prosecutor immediately after the trial; and that, after the delay which had taken place, it was hard that the prosecutor should be put to any costs. He also urged that the Court would impose upon the defendant a term, directing an entry to be made upon the record, in accordance with the fact, that the bill of exceptions was entered after the judgment, so that any objection upon this part of the case might be raised hereafter.

PATTERSON, J.—I shall make no order upon that subject. Nor do I think that I ought to visit the defendant with these costs, considering that the time which has passed over is the long Vacation, and knowing, as we do, that during that time there is a difficulty in getting these things done by counsel. At another time, when counsel are in town, it might be otherwise. The costs must be costs in the cause.

Rule absolute.

1842.

MASTERS v. DAVY.

Where there are amendable errors in a writ of trial, the defendant by appearing at the trial, and defending the action, precludes himself from subsequently objecting to the writ. Therefore, where, in a writ, the day of the date of the teste was left in blank, and the writ was ordered to be returned "immediately," instead of on a day certain, as is required by the 3 & 4 Wm. 4, c. 42, s. 17, but the defendant appeared at the trial, and went to the jury without raising any objection, it was held,

KELLY shewed cause against a rule obtained on behalf of the defendant, for setting aside the writ of trial in this action, and all proceedings thereon, with costs, or for arresting the judgment. The grounds on which the rule had been moved were, first, that the day of the date of the teste to the writ had been left in blank, which purported to be tested "on the day of July, 1841;" and secondly, that the writ was returnable "immediately," and not on a day certain, contrary to the provisions of the 3 & 4 Wm. 4, c. 42, s. 17. He contended that the present rule must be discharged with costs; first, because the defendant had waived the objections by appearing at the trial, without then raising any question as to the form of the writ. *Sherman v. Tinsley* (a) was in point; and secondly, because if the objection was of any weight, the Court would order the writ to be amended. *Farwig v. Cockerton* (b). The 18th sect. of the 3 & 4 Wm. 4, c. 42, and the Reg. Gen., H. T., 4 Wm. 4, gave the powers to amend.

W. H. Watson, in support of the rule. First, there had been no waiver, because it was sworn by the defendant's attorney that he did not arrive at the Court house where

nullity. It was, as regarded its return, in distinct contravention of the statute, which provided that every such writ should be returnable on a day certain, and the effect of the return being commanded to be made "immediately," was to give the sheriff any length of time he might choose to take for executing the writ. It was the writ which was the foundation of his authority, and unless it was regular, he possessed no authority whatever. Thirdly, there could be no amendment, because in this case, there was nothing by which an amendment could be made. In *Sherman v. Tinsley*, the Court suggested that an amendment might be made, but there, the objection was, that the cause had been tried one day after the return of the writ of trial, and the Court might have amended, by allowing a further time for the return. *Handford v. Handford (a)* shewed, that where there was an objection to a writ of trial, which deprived the sheriff of his jurisdiction, the Court would arrest the judgment.

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WIGHTMAN, J.—If the Court possesses the power to amend, as it undoubtedly does (*b*), there is no doubt that on a substantive motion it would have exercised that power. There is no motion, however, until this is made, and the question is, whether now the Court will put the parties in the same position as they would have been, if they had applied for an amendment. In the case of *Sherman v. Tinsley*, the Court of Common Pleas said that they would have amended, if it were necessary; but there, an amendment was not necessary, because the party then applying to the Court had appeared at the trial without raising any objection. That case, in short, comes to this; that a party by appearing at the trial, waives any objections of form

(a) *Ante*, vol. 6, p. 473, O. S.;
Vide *Blissett v. Tenant*, *ante*, vol.
6, p. 436, O. S.; S. C. 4 Bing.
N. C. 168.

(b) Vide *Attwill v. Baker*, *ante*,

vol. 5, p. 462, O. S.; S. C. 2 M.
& W. 272; *Cox v. Painter*, 1 N.
& P. 581; *Percival v. Connell*,
ante, vol. 6, p. 68, O. S.; 3 Bing.
N. C. 877; 5 Scott, 91, S. C.

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which could be cured by amendment. This case, therefore, seems to me to fall within the authority of that decision. If at the trial the objection could be cured by an amendment, the defendant by appearing, placed himself in the position in which the applicant to the Court stood in *Sherman v. Tinsley*. In that case, it was held to be unnecessary to amend, because the party had appeared; the defendant in this case also appeared, and having taken his chance of any defence which he might have, he now comes to the Court and seeks to get rid of the trial upon a technical point. This rule must be discharged.

Rule discharged (a).

(a) Vide *Emery v. Howard*, 9 M. & W. 108; S. C. *Ante*, vol. 1, p. 426, N. S.

LAWES v. SCALES.

Service of a rule nisi to compute on the daughter of the defendant's landlady at the house, in which the defendant was

SIR JOHN BAYLEY moved to make absolute a rule nisi to compute. A question arose, whether the service which had been effected was sufficient. The deponent to the affidavit on which the motion was founded, stated that he had served a copy of the rule nisi on the daughter of the defendant's landlady, at the house in which the defendant

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RAYMOND v. SMITH.

W. H. WATSON moved for leave to enter an appearance for the defendant in this action, after a writ of *distringas* had been granted. The sheriff had returned to the writ, *nulla bona*, and *non est inventus*, but the difficulty was, that the plaintiff could not obtain the affidavit of the sheriff's officer, stating what steps he had taken to serve and execute the writ. The plaintiff's attorney had written to him, in the country, several times, and had forwarded to him a draft of an affidavit, but he had never received any answer to his communication, and it was sworn that it was believed that the officer was in collusion with the defendant, or that he was influenced by his friends in the course which he had adopted. It was admitted, that without an affidavit of the means which had been taken to serve the writ, the Court would not allow an appearance to be entered; but it was urged, that in such a case as the present, the general power of the Court over its officers would be put in operation. [*Wightman, J.*—The difficulty is, that the sheriff's officer is not an officer of the Court, but, for this purpose, an agent of the plaintiff.] In *Chitty's Arch.*, p. 132, it was suggested, "If the officer will not make an affidavit of the efforts made by him to execute the writ, perhaps the Court would compel him to make it." The case might be considered as analogous to that of an attesting witness to a deed of submission to arbitration, and in case of a refusal by such a person to make an affidavit, the Court would compel him to do so (a).

The Court will not grant any process or rule against a sheriff's officer, who, having been entrusted to serve a writ of *distringas*, obtained to compel appearance, to which the sheriff has returned *nulla bona*, and *non est inventus*, will not make an affidavit of the efforts which he has made to serve the writ.

WIGHTMAN, J.—Is it necessary that you should have an affidavit from the sheriff's officer, in particular. You are to satisfy the Court that due and proper means have been taken to serve and execute the writ of *distringas*: it hap-

(a) Vide *Ex parte Pike*, ante, vol. 1, p. 275, N. S.

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pens, that your messenger will not make an affidavit; but some person might have gone with him, and may just as well be able to state what efforts have been made, as the officer; you may shew, by other means than by his affidavit, that the writ could not be executed, but I do not think you are entitled to any rule against the officer.

Rule refused.

DOE dem. CROLEY v. ROE.

In ejectment, the lessor of the plaintiff having proceeded as on case of a vacant possession under the statute, 57 Geo. 3, c. 52, but his remedy under that act having been defeated by the tenant serving notice, that he disputed the title of the lessor, and the tenant having subsequently avoided service

BOVILL moved for judgment against the casual ejector. The affidavit in support of the motion stated that the premises in question had been in the occupation of the present tenant during a period of five years, and that the rent had been unpaid during the whole of that time; that two unsuccessful attempts having been made to serve the tenant with a declaration in ejectment, application was made by the lessor of the plaintiff to two magistrates, in the usual manner, in order that proceedings might be taken as on a vacant possession, under the statute 57 Geo. 3, c. 52; that the customary notice having been affixed to the premises, it was taken down by the tenant, who gave notice to the attorney of the lessor of the plaintiff, that he disputed Mr.

like *Doe dem. Scott v. Roe (a)*. There, the tenant having absconded, leaving the key of the premises in question in the care of a broker, the Court granted a rule absolute for judgment against the casual ejector, service having been effected upon the broker, and by sticking up copies of the declaration and notice on the premises.

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Doe dem.
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v.
ROE.

PATTERSON, J.—The tenant having defeated your first remedy, will not now put himself in the way of disputing your title in a proper manner. You have made out a case for a rule to shew cause; service on the premises to be deemed good service.

Rule nisi granted.

(a) *Ante*, vol. 8, p. 254, O. S.; 6 Bing. N. C. 207, S. C. See *Doe dem. Nottage v. Roe, ante*, vol. 1, p. 750, N. S.

BULL v. PARKER.

BYLES had obtained a rule, calling on the plaintiff to shew cause why the verdict which had been entered for the plaintiff at the trial of this cause should not be set aside, and a nonsuit entered; or why the verdict should not be entered for the defendant, or why there should not be a new trial. It was an action of debt for goods sold and delivered; pleas, except as to 4*l.* never indebted, as to 4*l.* tender, before action brought, and payment into Court: Replication to the first plea, damages, *ultra*, and as to the second plea, a denial of the tender. At the trial before the

Where in an action of debt for goods sold and delivered, the plaintiff declared in the common form, but at the trial it appeared that a contract had been made between the parties, by which the defendant agreed to pay for the goods supplied, partly in other

goods and partly in money, and, there being no evidence offered to shew whether the defendant had or had not delivered to the plaintiff the goods agreed to be taken in exchange, the jury found a verdict for the plaintiff for the amount of the money only, it was held, that it was no objection to the verdict, that the plaintiff had not declared specially on the contract.

Where in support of a plea of tender, it was proved that an agent of the defendant had gone to the plaintiff and had offered him 4*l.* "in full discharge of his account;" and the question of the meaning of these words was not left to the jury, but a verdict was directed to be entered for the plaintiff, it was held, that the tender was sufficient, the plaintiff having offered no objection at the time it was made, to its form, and that he was called upon to accept the sum tendered in full discharge, but rejecting it simply on the ground that the money was not enough.

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under sheriff of the county of Cambridge, it appeared, that the plaintiff was a saddler, and that the defendant being desirous to procure a new saddle, went to him, and it was agreed between them that the plaintiff should furnish the defendant with a new saddle and bridle, for which the defendant was to give an old saddle and bridle, and 2*l.* in money. The price of a new saddle and bridle was admitted to be 4*l.* The new saddle and bridle were furnished to the defendant, besides other articles amounting to 2*l.* 13*s.* 3*d.* in value; making altogether 4*l.* 13*s.* 3*d.*, which the plaintiff claimed to be entitled to receive in money. The evidence of the tender was that of a witness named Goldsmith, who proved that he had gone to the plaintiff on behalf of the defendant; and he said, "I offered him 4*l.*, and I said, I went by the direction of Mr. C. Parker, to pay him 4*l.* in full discharge of his account; I laid down the money before Mr. Bull; he said he should not take it, I did not ask him for a receipt; I did not say, I will pay the money, if you will accept it in full discharge." It was objected that the plaintiff could not recover in this action, for that the contract proved, being for goods to be paid for, partly in money, and partly in other goods, there should have been a special count on the contract; the plaintiff also objected that the defendant had not proved a sufficient tender, for that it was clogged with a condition that the 4*l.*

the contract proved was, that the goods should be paid for partly in money, and partly in goods, the plaintiff must be nonsuited, for that the declaration should have been on the special contract. Those decisions, however, were not applicable here, for if the plaintiff chose to forego his claim to the delivery of the goods which he was to receive in return, he might still recover the money which it was agreed should be paid, *Sheldon v. Cox* (a). Here, the effect of the finding of the jury was to negative the plaintiff's claim for so much of the value of the new saddle and bridle as was covered by the proposed delivery of the old articles in return, for the total claim in money was 4*l.* 13*s.* 3*d.*; a sum of 4*l.* was covered by the plea of payment into Court; the jury found for 13*s.* 3*d.* only, and thus the residue, the value of which was 2*l.*, was left unrecovered by the plaintiff. Secondly, the tender which was proved was a conditional tender. In *Henwood v. Oliver* (b), the defendant, who disputed the amount of the plaintiff's bill, sent a person to tender a less amount, who said to the plaintiff, when he made the tender, "I am come with the amount of your bill;" the plaintiff refused the money, saying, "I shall not take that, it is not my bill;" and there it was held, that this tender was not accompanied by any such qualifying expressions, as would preclude the plaintiff from recovering a further sum, if really due upon his bill. In the present case, however, the expressions were of a different character, and if the plaintiff had taken the money upon the terms on which they were offered, he could not now have recovered. [*Wightman, J.*—There is a difference between saying, "I pay you in full discharge," and calling upon the plaintiff to admit that no more is due. Leave out the word "full," can it then be said to be a conditional tender; and does that word make any difference?] The omission of that word was immaterial; if the plaintiff had received the

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(a) 3 B. & C. 420; 5 D. & Ry. 277, S. C.

(b) 1 Q. B. 409; 1 G. & D. 25, S. C.

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money, he must have admitted that it was in discharge of his debt. *Strong v. Harvey*(a), and *Cheminant v. Thornton*(b), were cited.

Byles, in support of the rule. First, as to the tender, all that the supposed condition amounted to was this, that the witness, when he tendered his money, stated that it was the full demand. In *Richardson v. Jackson*(c), a witness proved that he went to the shop of the defendant, and saw the sister of the latter; that he told her, "that he had come to settle the defendant's account;" she then produced a book, and looking at it, said, "she could say nothing about it, unless her brother were present;" the witness then offered her 3*l.* 11*s.*: but she said, "her brother had looked over the book, and that there were one or two pounds more owing;" on his cross-examination, the witness admitted that he had said he would not pay the money without a receipt for the 3*l.* 11*s.*, and there, the under-sheriff left it to the jury to say whether the tender was proved, and they found for the defendant. Upon a motion to set aside the verdict, the Court of Exchequer held that the tender was sufficient. In this case, it was the duty of the under-sheriff to take the opinion of the jury upon the subject, and as he had not done so, the Court would either grant a new trial, or would enter the verdict for the de-

mained to be demanded, and the plaintiff could not, by reducing his demand, get rid of the difficulty which presented itself on his case.

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WIGHTMAN, J.—It seems to me, that the verdict on the first issue in this case should stand; but that the verdict should be entered for the defendant on the plea of tender. Upon the question which has been argued on the first issue, I am of opinion that the case falls within the decision of the Court in *Sheldon v. Cox*, which was referred to by Mr. *Gunning*, and that as in this case, it does not appear but that the saddle and bridle, which were to be given by the defendant, had been given, it is to be taken as if the only matter in difference was the money to be paid. On the authority of the case which was cited, therefore, I think that this action may be maintained; the proceeding not being to recover any damages, in respect of the non-delivery of the saddle to the plaintiff. With regard to the question of tender, I think that on that plea the defendant is entitled to recover. It was said that the tender was bad, because it was made in full discharge of the plaintiff's account. *Henwood v. Oliver* was referred to. There, the tender was made as the amount of the plaintiff's bill, but the plaintiff expressly refused to receive it, because he said, that the account was more; and yet the Court held that the tender was good. Here, though it is true, the words were not the same, and might be capable of a different construction, yet, as the case was not left to the jury, nor any objection made on the part of the plaintiff to the tender when it was proposed, I should take it, that there was no such condition annexed to it when it was made, as would make it amount to this, "unless you accept this money in full discharge, I will not pay it at all." The plaintiff refused to take it, because it was too little; he did not object to the form of the tender, nor to the fact of his being called

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on to accept the money in full discharge. I think, therefore, that the defendant is entitled to a verdict on this issue; but that the verdict on the first issue must stand for the plaintiff.

Rule accordingly.

NELMES v. HEDGES and Others.

A certificate in order to entitle the plaintiff to costs, under the statute, 3 & 4 Vict. c. 24, that an action was "really brought to try a right, besides the mere right to recover damages," is valid, although it be not applied for until one of the jurors in another cause has been sworn, and although it be not actually given until the whole of them are sworn.

THIS was an action of trespass for breaking and entering the dwelling house of the plaintiff, and expelling him therefrom; plea, not guilty, "by statute." The cause was tried before *Williams, J.*, at the Summer Assizes for the county of Buckingham, and upon the evidence, the title to the premises came in question. The trial occupied the whole day, and at seven o'clock in the evening the jury retired to consider their verdict. After some delay, the learned Judge, and the counsel on both sides, quitted the Court, an agreement having been made between the latter that the verdict should be taken by the associate. At a quarter past eleven o'clock at night the jury returned into Court, and gave a verdict for the plaintiff, with one farthing damages. The verdict having been indorsed on the record, the jury were discharged. On the following morning at

Gunning, (on the 5th of November) moved for a rule, calling upon the plaintiff to shew cause why this certificate should not be rescinded, upon the same ground urged at the trial, namely, that it was too late. The statute required such a certificate to be granted "immediately" after the trial of the cause, and although it might perhaps be conceded that this provision would be met by a certificate being granted at the sitting of the Court on the day after this action had been tried, yet this certificate not having been granted until the jury in a new cause had been sworn, there had not been a sufficient compliance with the provisions of the statute. In *Shuttleworth v. Cocker* (a), a construction had been put upon the statute, and from that case it appeared that the act must be taken to require the certificate to be granted before any new matter took possession of the mind of the Judge (b). *Thompson v. Gibson* (c), and *Page v. Pearce* (d), were cases in which the Court of Exchequer had given opinions upon the same act, and although in the latter case the Court had intimated that the Judge was at liberty to grant a certificate even after the trial of a new cause, that opinion was extra-judicial, and contrary to the earlier authorities, and to the obvious intention of the Legislature. *Waggett v. Shaw* (e) was also referred to.

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PATTESON, J., (on the 17th of November) gave judgment. I have looked into the cases upon this question, and I think that the decisions in *Thompson v. Gibson*, and *Page v. Pearce*, are authorities so directly in point, that I cannot allow this rule to go. The effect of the decisions in those cases is, that the word "immediately," in the sense in

- (a) *Ante*, vol. 9, p. 76, O. S.; 8 M. & W. 281, S. C.
 2 Scott, N. R. 47, S. C. (d) *Ante*, vol. 9, p. 815, O. S.;
 (b) Vide per Parke, B., in *Gillett v. Green*, *ante*, vol. 9, p. 219, S. C. 8 M. & W. 677. See *Pryme v. Brown*, *ante*, vol. 1, p. 680, O. S. N. S.
 (c) *Ante*, vol. 9, p. 717, O. S.; (e) 3 Camp. 316.

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which it is employed in the act of Parliament, does not mean so soon as the verdict is given, without any time whatever being taken for consideration, but that a reasonable time for consideration may be taken, and that a Judge, if called upon to certify under the act, must have some time allowed him for consideration. If, however, the word was construed to mean the moment the verdict is delivered, the Judge would have no time whatever to view the bearings of the case. In this case it seems to be admitted, that the jury having retired, the parties consented that the verdict should be taken by the associate, and the learned Judge and the counsel on both sides having gone away, it was not to be expected that any certificate would be applied for on that night. It was not applied for either on the next morning the moment the Court sat, but the application was made before the business of any other cause was entered upon; and, after the jury in a new cause were sworn, the certificate was granted. On the authority of the two cases to which I have referred, I think this rule must be refused; those cases went a great deal further than this, but I agree with the decisions which were there arrived at. How far the provisions of the act will go, I cannot say; but there is a case where a Judge having gone from the assize town to another county, an application for a certificate there was held too late. I know that the cases

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REGINA v. The Justices of STAFFORDSHIRE.

THIS was a rule, calling upon the justices of the county of Stafford, to shew cause why a writ of mandamus should not issue, commanding them to enter continuances, and hear an appeal of the churchwardens and overseers of the poor of the township of Ramshorn, in the parish of Ellastone, against an order for the removal of a female pauper, and her family, from the parish of Kingsley, in the same county. The order of removal was dated the 29th of July, 1842, and was served on that day. On the 18th of August, the appellant parish gave notice of appeal, and, on the 1st of October, they served the respondents with a statement of their grounds of appeal; the Sessions commenced on the 18th of October, and the appeal was called on for trial on the following day; after it had been called on, an application was made to the Court, on behalf of the appellants, for an adjournment until the following Session, to afford them an opportunity of preparing and serving a better notice of the grounds of appeal, those which they had served being considered by them to be defective. This application was supported by an offer to pay the costs of the day; but, upon its being opposed by the counsel for the respondents, the Court refused to accede to it, and the order of removal was confirmed. The present rule had been obtained upon the grounds that the question of adjournment was one upon which it was competent for the Court of Quarter Sessions to exercise their own discretion and that the Court would authorize them to rehear their appeal upon the merits, even without the consent of the respondent party.

Where upon the hearing of an appeal at Sessions, upon an order of removal, the appellant parish admitted the insufficiency of the grounds of appeal stated in his notice, but applied for an adjournment to deliver fresh grounds, and offered to pay the costs of the day, but the magistrates refused to direct such adjournment, and confirmed the order; it was held, that this Court would not interpose to order continuances to be entered, and the appeal to be heard on its merits.

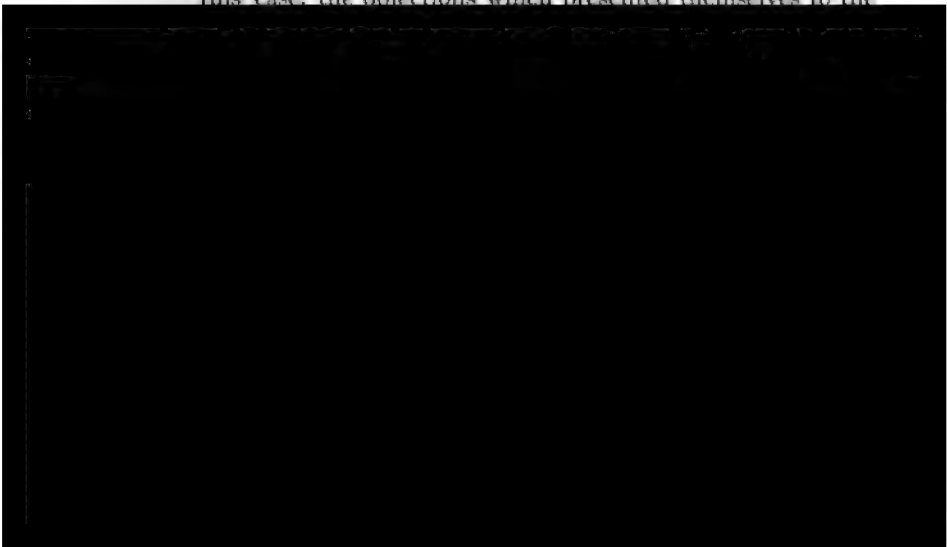
F. V. Lee now shewed cause. *Rex v. Kimbolton (a)*,

(a) 6 Ad. & El. 603.

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was a distinct authority against this application, for there, it was held, that if a sufficient notice of appeal was served, but the grounds of appeal stated were defective, the Court of Quarter Sessions was not bound to adjourn the appeal, although they possessed the power to adjourn. That was no reason here, why the Court of Quarter Sessions should have exercised the authority which they possessed; the appellant parish was bound to go to the next practicable Sessions; they had elected those of the 18th of October, and if they had been guilty of negligence, they must bear the consequences. The simple question was, whether the justices were bound to adjourn? There was nothing to compel them to do so, or to shew that they had desired to do so; and, if they had exercised the discretion which they undoubtedly possessed, the appellants could not complain. *Rex v. The Justices of Monmouthshire (a)*, and *Rex v. The Justices of Leicestershire (b)*, were referred to.

Whateley, contra. Although the Court of Quarter Sessions might be bound to adjourn an appeal under the circumstances which had here arisen, this Court would exercise the general power of supervision which it possessed, and would see that the discretion to which the justices were entitled was exercised in a reasonable manner. In this case, the objections which presented themselves to the



WIGHTMAN, J.—The difficulty is this; the Court of Quarter Sessions have determined that they would not adjourn the case. They have not reserved the point whether they were right or wrong in doing so, and unless they were bound to adjourn, and it is admitted they were not, I do not see how the Court can interfere.

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Rule discharged.

WINGFIELD v. BARTON, Secretary, &c.

COWLING moved for leave to issue execution against certain parties, shareholders in the "Patent Rolling and Compressing Iron Company," under the 11th section of the 4 & 5 Vict. c. lxxxix, under which the company is established. It appeared that an action had been brought against the defendant, as secretary of the company, and a verdict recovered by the plaintiff; execution had issued against the goods of the company, to which there was a return of nulla bona, and the present application was therefore made. The statute was passed to enable the company "to purchase certain letters patent, and to sue and be sued." Section 5, gave the power of suing, &c., and it provided, "That in all actions, suits, and other legal proceedings, other than proceedings of a criminal nature, and all proceedings in lunacy or bankruptcy, whether by way of petition, fiat, or, in Scotland, sequestration, or otherwise, to be hereafter instituted or prosecuted by or on behalf of the said company, either alone or jointly with any other necessary parties, it shall be sufficient to state and to proceed in the name of the secretary or one of the directors for the time being of the company, as the nomi-

The statute 4 & 5 Vict. c. lxxxix. s. 5, enables the "Patent Rolling and Compressing Iron Company," to sue and be sued in the name of their secretary; s. 11, enacts that every judgment, &c., in any proceedings against such nominal party shall have the like effect, (under certain circumstances,) upon the property of every shareholder, "as if every individual shareholder had been, by name, a party to such proceeding;" s. 12, provides, that the plaintiff may cause execution upon any judgment to be issued

against all or any of the shareholders, &c., provided that no such execution shall be issued, without leave first granted by the Court upon motion in open Court: *Held*, that the shareholders could only be charged by sci. fa.: *Semble*, that it is necessary that motion in open Court shall be made for such writ of sci. fa.

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nal plaintiff representing the company in such proceedings; and that in all actions, suits, and other legal proceedings to be hereafter instituted or prosecuted against the company, either alone or jointly with any other necessary parties, it shall be sufficient to state the name of the secretary, or some one of the directors; or, where there shall be no secretary or director, then the name of some one of the shareholders for the time being of the company, as the nominal defendant, representing the company in such proceedings: Provided always, that any party suing the company may, if he think fit, join any shareholders of the company, or persons who shall have been shareholders of the company, together with such nominal party as defendants in equity, for the purpose of discovery, or in case of fraud." Section 11, under which this application was made, enacted, "That every judgment, decree, or order of any Court of justice, in any proceeding against any such nominal party as aforesaid, may be lawfully executed against, and shall have the like effect on the estate, funds, and property of the company, and, subject to the restrictions herein-after enacted, upon the person, estate, funds, and property of every shareholder thereof, as if every individual shareholder had been by name a party to such proceedings." The parties now sought to be charged, were sworn to have been shareholders before

Bosanquet v. Ransford arose, were not so strong as those employed in this statute; for in the former, it was only enacted that "every judgment obtained, &c., shall have the like effect upon the property of such co-partnership, and of every member, as if obtained against the co-partnership:" but here, the circumstance was contemplated of the shareholder being actually "party to the proceedings." The 12th section of the statute on which this motion was founded, besides, seemed to contemplate such a motion as the present; it provided, "That it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against any such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the company, and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into upon which such action or suit shall have been instituted: Provided always, that no such execution against any person being or having ceased to be a shareholder, shall be issued without leave first granted by the Court in which such judgment, decree, or order shall have been obtained, upon motion in open Court, and after notice of such motion given to the person sought to be charged," &c. Unless a motion for judgment was here referred to, it was doubtful what was meant. [*Patteson, J.*—The Bank Act contains the same words in section 13, because it provides that no such execution shall issue "without leave first granted on motion in open Court." The Court of Queen's Bench, and the Court of Error have nullified those words, because they have held that the proceeding must be by *sci. fa.* I do not see how the words of this act can be said to differ from those of the 7 Geo. 4, c. 46.] The statute now in question was of more recent date than that of the 7 Geo. 4,

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and it was probable that the Legislature would not have adopted a new form of words without some intention different from that which had governed it in framing the former act. [*Patteson, J.*—I confess I cannot see any distinction in fact between the two statutes; and I think at present that your motion should be for a writ of scire facias against the shareholders. I will, however, consider the matter, and compare the provisions of the two statutes.]

Cur. adv. vult.

PATTESON, J., on a subsequent day, said, I have looked at the two acts, and have carefully compared their provisions, but I cannot draw any distinction in my own mind between their provisions. The plaintiff had better, therefore, take a writ of scire facias by leave of the Court.

Writ granted.

—◆—
 POOK v. BURROWS.

The defendant
 was served
 with a writ of
 summons on

MA^RTIN shewed cause against a rule obtained on behalf of the defendant, for a review of the taxation of costs



sent to a Judge's order being obtained for judgment for 28*l.* 2*s.* 8*d.* debt and costs, to be taxed as between attorney and client, the amount to be paid on the 7th of November. An order of *Coleridge*, J., to this effect, was drawn up, and was served on the defendant, and on the 27th of October the defendant was served with an appointment to tax: he did not attend the taxation, and, in his absence, the costs were taxed at 6*l.* 6*s.*, a portion of the charge allowed by the Master being for the preparation of the declaration and particulars in the cause. This was the item to which objection was raised by this rule. An affidavit in answer was now produced, in which it was alleged, that the taxation took place in the ordinary course, and that the plaintiff's attorney had, in fact, prepared the declaration and particulars before the defendant applied to him to settle the action. It was urged, first, that this motion was too late, for that it was not made until after the 8th of November, when the money had already become payable under the order of the learned Judge, and when execution had been sued out, and that it was a mere attempt to obtain further time; and, secondly, that the plaintiff's attorney was entitled to the costs of preparing the declaration and particulars, for that the practice of the Court authorized their preparation at any time after the fourth day from the service of the writ of summons. Further, the costs were to be taxed as between attorney and client, and not as between party and party, and the attorney was, therefore, entitled to all that had been allowed, having proceeded only with due promptitude for the interests of his client.

Dowling, Serjt., in support of the rule. First, the motion was not too late; the defendant, under the Judge's order, was not required to pay until the 7th of November; it was not until the 8th that the demand of the money was made by the plaintiff, and it was then only that he discovered the charge of which he now complained: that the defendant

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did not appear before the Master on the appointment to tax, was immaterial, and any application to the Court before he ascertained by the plaintiff's demand what amount of costs was allowed by the Master, would have been quia timet. Secondly, the plaintiff's attorney had prepared his declaration too soon. The defendant had not appeared when he applied to the plaintiff's attorney to settle the action, and the plaintiff could not, at all events, have declared until the 24th of October, under the 11th section of the 2 Wm. 4, c. 39. It was quite unnecessary, therefore, to prepare a declaration so early as the 7th of October.

PATTESON, J.—The Master could not have been aware of the dates in this case; if so, he would have seen that the declaration could not have been delivered before the 24th of October; it is not stated in the plaintiff's affidavit that the dates were brought before his notice, and although part of the defendant's difficulty arises from his not attending the taxation, still I think that it was the duty of the plaintiff's attorney to have told the Master what the real facts were. The case must go back to the Master, because I think that he has had no opportunity of exercising his judgment whether these were proper charges to be allowed or not. The plaintiff's attorney having suffered the Master to be in error, in supposing either that this de-

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IN Hilary Term, 1842, *Baines* had obtained a rule, which called upon Mr. William Ellis, and Mr. Joseph Greenwood, magistrates of the West Riding of Yorkshire, to shew cause why a mandamus should not issue to them, commanding them to grant a warrant of distress under their hands and seals, for levying upon the goods and chattels of Thomas Wall, an inhabitant and occupier of rateable property within the township of Keighley, the sum of 18s. 9d., in respect of a rate made for the relief of the poor of that township on the 8th of May, and also a like warrant of

It is no objection to a rule, for a mandamus to justices, to issue their warrant of distress for the levy of poor rates, that it includes two separate and distinct rates.

Although there are more than two magistrates at petty sessions, all of whom

take part in a decision, by which the issuing of a distress warrant to levy poor rates is refused, it is not necessary that upon an application for a mandamus, all who were present and took part in the decision, should be included in the rule; but if the Court saw that any two had been selected, or that any of the justices so acting had been omitted for any improper purpose, all would be required to be joined.

Where upon an application for a mandamus to justices, to issue their warrant of distress to levy a poor rate, it appeared that the property, in respect of which the rate was sought to be obtained, was trust property, left by a testator for the purposes of a free school, and that one of the justices refusing to grant his warrant was a trustee of the estate; it was held, that notwithstanding his character as such trustee, he was liable to the mandamus.

A poor rate was made on the 8th of May, 1841, for the township of K., W., an occupier of land in the township, having refused to pay the rate made upon him, was summoned and appeared before the justices of K., on the 26th of August; the application of the parish officers for a warrant of distress was then refused by the justices; on the 21st of September, the parish officers obtained counsel's opinion on the question of the liability of W.; on the 18th of September, a second rate was made; on the 16th of October, W. was summoned before the justices of S. in respect of both rates, but the justices being equally divided in opinion gave no decision; a new demand was then made by the parish officers of the second rate, and on the 29th of December W. again appeared on a summons before the justices of K., in respect of that rate, but they again refused to issue their distress warrant: *Held*, that the parish officers were not too late in applying for a mandamus in respect of both rates in H. T., 1842: *Held* also, that the magistrates of S., being equally divided in opinion upon the question of the liability of W. to the second rate, the parish officers were entitled to take the case before the magistrates of K., and that the latter had jurisdiction to act.

A testator by his will devised to the township of K., certain premises, for the maintenance of a sufficient schoolmaster for teaching children, residing within the town and parish of K., free and without any other stipend, and then said, "and it is further my desire that the town and parish of K., will exempt, free, and discharge my said messuages, &c., in K., as aforesaid, of and from the payment of all lays, taxes, impositions, and assessments:" *Held*, that although from the year 1713 to the year 1841, no assessment of poor rate had been imposed in respect of the premises in question, that although in 1841, a resolution of vestry was come to, by which it was determined that they should be exempted, and that although the objects of the testator had been carried out by the establishment of a free school, and the payment of a schoolmaster out of the rents and profits of the devised premises, the assent to the condition of the will, by the parishioners, did not exempt the beneficial occupier from being assessed to the relief of the poor, by the township of K., (which is an independent township, maintaining its own poor,) in respect of the same premises.

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distress for a further sum of 18*s.* 9*d.*, in respect of a like rate made on the 18th of September, 1841.

R. Hall now shewed cause. The rule was obtained upon the affidavits of various persons, the overseers and the collector of poor-rates for the township of Keighley, and from them it appeared, that in May, 1841, a rate of 1*s.* in the pound for the relief of the poor of that township, was duly made and allowed; and that Thomas Wall, an inhabitant of the township, was included in the rate, and was therein charged as occupier in respect of a house occupied by him under the trustees of the Keighley Free School, the rateable value of which was stated to be 18*l.* 15*s.*; that 18*s.* 9*d.* became due under the rate in respect of his occupation of those premises; that Wall had resided in the said house with his family, and had had a beneficial occupation of the same, in respect of which he was rated from the year 1830 continuously to the present time, and that he still continued to reside in and occupy the same; that neither Wall nor any person had been rated for many years in respect of the premises in question, in consequence of a desire expressed in the will of Mr. J. Drake, that the land upon which the said house had been erected, and which he had given to the trustees for the purposes of a Free School at Keighley, should be exempted

peace, &c., against the said Thomas Wall, and the said Wall was thereupon summoned to appear and did appear before Mr. William Ellis, Mr. Joseph Greenwood, and Mr. Edwin Greenwood, three justices, on the 25th of August, 1841, when, upon hearing the facts above stated, the said Magistrates, though thereunto requested, &c., and though proof was given of Wall's refusal to pay the rate, declined to grant a distress warrant against the said Wall for non-payment thereof, and the said magistrates then indorsed a memorandum of their decision upon the information, as follows: "We, entertaining a doubt as to the legal liability of Mr. Wall to pay the rate, and inclining in favor of his exemption, refuse to grant a distress warrant for the recovery thereof, and dismiss the complaint accordingly;" that the overseers, in consequence of this decision, took the opinion of counsel upon the question of the liability of Wall, and that the opinion, dated 20th of September, was favorable to this application. The affidavit then stated a further rate of 1s. in the pound to have been made on the 18th of September, in the same year, in respect of which, Wall was charged with a further sum of 18s. 9d. in respect of his said house, and that certain of the Keighley magistrates, being trustees of the Free School, it was deemed advisable to apply to the magistrates in petty sessions at Skipton, in the West Riding, in respect of the non-payment of that rate by the said Wall; that Wall was, in consequence, duly summoned to appear, and appeared before four justices assembled in petty session at Skipton, but that the Skipton magistrates, having ascertained that the case had been already before the justices at Keighley, refused to interfere; that a demand was then made upon Wall for the second rate, and that a refusal being given, he was summoned and appeared before Mr. William Ellis, Mr. Frederick Greenwood, and Mr. Joseph Greenwood, magistrates in petty sessions assembled at Keighley, on the 29th of December, and that the said magistrates then again refused to issue a distress warrant against the said Wall,

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upon the ground that he was not liable to pay the rate, first, because the parish had consented to accept the trust under Mr. Drake's will with the term imposed, that that should be only accepted on the property being exempted from rates; secondly, because the parish had never demanded rates for more than a century; and thirdly, that the original contract of exemption had been confirmed by the resolutions of a recent vestry meeting. Affidavits in answer were now produced, which stated that Frederick Greenwood, and the defendant, William Ellis, were two of the acting trustees for the management of the property devised by Mr. Drake to the parish of Keighley; that the parish had been, from the date of Mr. Drake's death (27th of May, 1713), in the full enjoyment of the property so devised, and that during all that time, according to the belief of the deponents, the same had been exempted from the payment of all lays, taxes, and parochial assessments; that the existing leases of the persons occupying the premises in question, were contracted for upon the understanding of such exemption; that the rent and proceeds were applied in furtherance of the objects expressed in the will of Mr. Drake; that the house occupied by Wall was built upon, and formed part of the property devised; that these facts were proved before the magistrates in petty sessions, and were not contradicted on behalf of the over-

preceding the meeting, it was determined by a resolution, which was carried by a majority of twenty to three, "that the property of the Keighley Free Grammar School be exempted from parochial rates according to the request of the founder, and as has been sanctioned by the parishioners." The following extract from the will of Mr. Drake was also set out in the affidavits.

"Item : I give to the township of Keighley, all those my two messuages, barns, buildings, &c. situate, lying, and being in Keighley aforesaid, in the county of York, &c., for the maintenance of a sufficient, and unmarried, and qualified schoolmaster, for teaching of children residing and dwelling within the said town and parish of Keighley, in the English, and Latin, and Greek tongues ; which said schoolmaster, for the time being, shall always teach and instruct children within the said town of Keighley, free, and without any other reward or stipend whatsoever, and have the rents and profits of my said messuages, &c. yearly paid him, &c. And it is further my desire, that the town and parish of Keighley aforesaid, will exempt, free, and discharge my said messuages, &c., of and from the payment of all lays, taxes, impositions, and assessments whatsoever."

It was now contended, that the rule which had been obtained was informal ; first, it sought to procure a mandamus to be issued in respect of two distinct and separate rates ; but it was urged, that there should have been separate rules obtained in respect of each cause of complaint, for that it might happen that in one matter a good defence might be given, as that the application to the justices was too late, or otherwise ; while in the other, no answer could be afforded, and thus confusion would be produced. The question of costs might very materially depend upon the answer to be made to the rule ; but it was to be observed, that in a case moved as this was, even if the defendant was entitled to succeed upon one point, he could not obtain his costs upon that point, because they could not be distinguished from those which his adversary might be en-

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titled to be paid upon the other. Secondly, the application was directed against the wrong parties. From the affidavits it appeared, that the liability of Mr. Wall to the rate of the 8th of May, 1841, was discussed upon the complaint of the overseers, not only before the defendants, Mr. William Ellis and Mr. Joseph Greenwood, but that there was present at the same petty sessions, Mr. Edwin Greenwood, of whom, however, on this application, no notice was taken. The same observation applied also to the second hearing, upon the complaint in reference to the rate of the 18th of September, because there also the magistrates present were the two defendants and a third magistrate, Mr. Frederick Greenwood. The rule, however, ought to have been directed against all the magistrates who were present at and assisted in the hearing. It was true that the statute 43 Eliz. c. 2, s. 4, authorized the issuing a distress warrant in such a case, by two justices, but where more than two were present, the jurisdiction was vested in all, and all must be joined in any proceedings in respect of their acting or refusing to act, to the exclusion of a smaller number of them; *Rex v. Townsend* (a); *Regina v. The Justices of Staffordshire* (b); *Rex v. Sainsbury* (c); *Rex v. Wix* (d); *Regina v. St. Saviour's* (e). The case was like that of an award, and it had been held (f), that where a dispute was referred to three persons, the parties were en-

in opinion, no order was made. The objection having been raised, that the mandamus could not go against one justice, when two had refused to act, Lord *Denman*, C. J., after refusing the rule on other grounds, said, "It is also a well founded objection to this rule, that it is applied for against one justice only, whereas it does not appear that one only refused the order." From that observation it was to be inferred, that the writ must be asked for against all who refused to act, and in this case, the affidavit shewed the refusal of all the magistrates at both petty sessions. If the rule was not such as was contended for, how was the selection of the magistrates, against whom proceedings were taken, to be made? Supposing, in such a case, several magistrates to be present at a petty sessions, and that the majority should be unfavourable to the application, but that there should be two who were not averse to it; if a selection was to be made, the two last named might be those chosen, and by collusion, the mandamus might be thus obtained, and the party complained of thus unjustly harrassed. For the sake of securing the due administration of justice, therefore, the Court would not sanction any selection being made, but would require all the justices who constituted the Court of petty session, to be included in the application. But, thirdly, if any selection was to be made, Mr. William Ellis was the gentleman whose name should have been omitted, because it appeared that he was a trustee of the charity for which an exemption was claimed. [*Patteson*, J.—That was a very good reason for his refusing to act, but it forms no answer to this application.] Fourthly, the present motion was too late, so far as it concerned the rate of the 8th of May, 1841. From the affidavits, it appeared, that the first hearing upon the summons against Wall for that rate, took place on the 25th of August; on the 21st of September, the overseers obtained counsel's opinion upon the question, and although, on the 16th of October, a summons, in respect of the second rate (of the 18th of September), was heard; they passed over Michaelmas Term,

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1841, and failed to come to the Court for the present rule, until Hilary Term, 1842. Fifthly, with regard to the second rate also, this application must be unsuccessful; for if any mandamus should go, it should be against the Skipton magistrates, to whom application was first made, and whose refusal to act was first given. It was clear that they were authorized to act, but they refused to do so; yet no proceedings were taken against them. There was a suggestion of a fresh demand and refusal of the rate from Wall, after the hearing at Skipton, but the Court would not countenance proceedings such as those which were disclosed, for if such were allowed, the effect might be, that complainants in the position of these overseers, would resort to the indecent practice of going through the whole list of magistrates for the county, until they had found two who were favorable to their views. The matter, therefore, having been once before the magistrates at Skipton, it was incompetent to the applicants to go to other justices, in respect of the same subject. But sixthly, as to the rateability of the property. Upon this, as well as the formal objections, the rule must be discharged. This turned upon the construction to be put upon the will of the testator, Drake; it was submitted, that upon the terms of the will, the parish had taken this property subject to a condition, exempting it from the payment of rates, which was binding

liable to actions, or that such of them as were trustees, and had entered into agreements with masters or tenants, would, by the necessary infraction of those agreements, be rendered open to proceedings in Chancery. The case of *Rex v. Catt* (a), was supposed to be analogous to this; there, the master of a free school was appointed by the minister and inhabitants of a parish, under a deed of indenture, whereby a house and garden were assigned for the habitation of the master, and for the use of him and his family freely, without payment of any rent, income, gift, sum of money, or other allowance whatever, for or out of the same; which, together with certain lands and annuities were given for the teaching of ten boys, sons of the meaner sort of the inhabitants of the parish; it was held, that the master, being the occupier of the house and garden, was rateable for them. There, however, the very foundation of the case was a deed, and it was the parties only to a deed who were bound by it. The obligations under this will, however, were of a different character and were binding on the parish. The case of *The Attorney General v. Black* (b), arose in reference to the same charity. The object of the charity then, besides, was limited to the education of ten poor boys, whereas in this case, it was given "for the teaching of children residing and dwelling within the towns and parish of Keighley;" there being no limitation as to the number or class. That no precise form of words was necessary in order to create a condition in a will, was clear, as well as that when the testator's intention to impose a condition obviously appeared, it must be carried into effect (c). It was only necessary, therefore, in this case, to shew that the words used were imperative. The word "desire," which was employed, was always so construed; *Harding v. Glyn* (d); *Foley v. Parry* (e); *Brown v. Higgs* (f). Nor was any

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(a) 6 T. R. 332.

(b) 11 Ves. Jun. 191.

(c) Wms. Ex. 785.

(d) 1 Atk. 469.

(e) 2 M. & K. 138; 5 Sim. 138.

(f) 8 Ves. 561.

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distinction to be drawn from the circumstance, that the testator, in imposing the condition, or proposing the election contained in this will, was dealing with property, or rights, or liabilities, over which he had no control. For here, the true description of the term was, that it put the parish to an election, and the election to take the property having been made, that was sufficient to establish the condition, *Popham v. Bampffield* (a). The enjoyment for one hundred and twenty-five years of freedom from parish rates, afforded ample proof of the construction, which during that period, had been put upon the will; and it was a well-known rule, that although a charity was not barred by the Statute of Limitations, an adverse enjoyment for a long series of years, afforded a very material consideration in construing an instrument under which it claimed. *Attorney General v. The Mayor of Bristol* (b). The question, however, might shape itself into one of election, and the rule upon this subject was laid down in *Roper on Legacies*, p. 481. There, *Thellusson v. Woodford* (c), was cited, and a judgment of Lord Rosslyn was given, who said (d), "No person puts himself in a capacity to take under an instrument, without performing the conditions of the instrument, and they may be express or implied; if it is stated, or can be collected that such was the intention of the parties to the instrument, that intention

the property could no longer be said to belong to them. Their non-interposition to demand the rates for one hundred and twenty-five years, was, at all events, binding on them, and the resolution which had been come to by the vestry, was equally so. *Attorney General v. Hartley* (a); *Still v. Palfrey* (b); *Attorney General v. Foyster* (c); *Re Chertsey Market* (d), shewed that the general position that parishioners could not bind their successors, was too large; and *Veley v. Burder* (e), established the proposition that parishes were, for some purposes, corporations. *Blackbourn v. Webster* (f), and *Martin v. Nuthin* (g), were cases in which the Court of Chancery had compelled parishes to do equity, from which it was to be collected, that incoming parishioners were bound by the agreement of the parish at large.

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The *Solicitor General*, and *Baines*, in support of the rule. First, as to the objection that all the magistrates who were present at Petty Sessions ought to have been included in this motion. There was no case which justified such a proposition. The case of *Rex v. Sillifant* had been misconceived. There, an application was made for a mandamus against Mr. Sillifant, commanding him to make an order for the payment of a church-rate, under 53 Geo. 3, c. 127, s. 7, and the objection taken was, that one magistrate could not make an order under the act, and that a second magistrate, not being shewn to be willing to make the order, a mandamus could not go against one only. Where many magistrates were assembled at Petty Sessions, however, and any two refused to do an act which two might perform, a mandamus would lie against them. Under this act of Parliament, the authority was given to two

(a) 2 Jac. & W. 353.

(b) Cor. Sir H. Jenner, Arches Court, Dec. 11th, 1841. Reported in "Short Notes in the Ecclesiastical Courts," p. 220.

(c) 1 Anst. 116.

(d) 6 Price, 261.

(e) 12 Ad. & El. 265.

(f) 2 P. Wms. 633.

(g) 2 P. Wms. 266.

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magistrates to make the order; the two gentlemen against whom this application was made had been applied to, but they had refused, and the overseers were in consequence compelled to come to the Court. It was absurd to suppose that the rule contended for could prevail to its full extent, because, if that were so, and twenty magistrates were present at a Petty Session, and the name of any one was forgotten, that would afford a sufficient answer to such an application. Neither did the fact that this rule referred to two rates afford any ground of objection. In *Rex v. The Justices of Suffolk (a)*, an appeal against four rates was held unobjectionable; and that was an analogous case. But, thirdly, it was said that, as against Mr. Ellis, at all events, this rule ought not to go, for that he was a trustee for managing this Charity estate. This was an argument which might well have prevailed with him to induce him to abstain from acting in this matter, but which afforded him no excuse for his refusal to act lawfully. It was not sworn that he had declined to act, but on the contrary, it was stated that he had refused to grant the application for a warrant. It was his duty, however, as a justice of the peace, to have sanctioned that application. Fourthly, it was argued, that as regarded the rate of the 8th of May, the application was too late, for that Michaelmas Term of the year 1841 was passed over without any application to the

the objection to the jurisdiction of the magistrates of Keighley, as to the second rate, on the ground that the matter was already before the magistrates of Skipton, could not prevail, because the Skipton magistrates had, in fact, refused to act, being equally divided in opinion upon the case. Seventhly, upon the merits of the case this rule must be made absolute, for neither had the will of the testator, nor the lapse of time since the levying of any rate in respect of these premises, any effect in exempting them from the rates, whilst they were in the hands of a beneficial occupier. With regard to the will, it was material to observe, that it had reference to the teaching of children residing within the town and parish of Keighley; the children were not to be the poor of the parish, nor was the particular township in which the property was situated alone to enjoy the advantages intended to be conferred. The township of Keighley was a distinct part of the parish, however, and maintained its own poor, and the rate in question was a rate of the township, and not of the whole parish; and, supposing the condition contended for to be annexed under the will, it had no operation upon the rights of this particular township. But further, the township had no authority to admit such an exemption as was contended for. The law declared that every occupier should pay rates, and a rate omitting any one would be bad for such omission. The persons who now occupied these premises were beneficial occupiers, and, according to the language of Lord *Kenyon*, in *Rex v. Munday (a)*, they must be rated. The principle on which the rating must be made, would be found laid down in *Nolan's Poor Laws*, pp. 184, 5, 8. Lastly, neither the agreement of the parish, one hundred and twenty-five years ago, when the will of the testator came into operation; nor the lapse of time during which the property had been exempted, had any effect in rendering it exempt any longer. The statute 43 Eliz. c. 2, was

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(a) 1 East, 584.

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imperative in requiring every inhabitant and occupier of land to be rated; and *Rex v. Barker* (a), and *Regina v. Marriott* (b), shewed that no exemption could be made.

Cur. adv. vult.

PATTESON, J.—This was a rule for a writ of mandamus to two justices of the West Riding of Yorkshire, to issue two distress warrants for two poor rates. Several preliminary objections were taken, which I will first consider. First, it was contended that one writ of mandamus cannot go, commanding the justices to issue two warrants for district rates, although they are against the same person, and in respect of the same property. If this objection were to prevail, it would only have the effect of confining the present rule to one rate, and make it necessary to move for another rule as to the other, and so increase the expense. But I cannot think this to be necessary. The writ of mandamus might be divisible. If there were any difference in the circumstances attending the rates, they might be separately considered; the rule might be made absolute as to one, and not as to the other, and even the costs might be apportioned; and so might it be, if a return were made to the writ of mandamus; and, as it has been decided that four rates may be included in one appeal.

there that the objection was fatal, that the writ was moved against one, whereas two had refused. But, as was observed by the Solicitor General in arguing this case, the writ was clearly wrong in *Rex v. Sillifant*, for it was to command one magistrate to do that which by law cannot be done by less than two. No other express authority was cited, nor have I been able to find any. Inconveniences were pointed out which might arise from the selection of two or more out of several magistrates refusing an order, and, undoubtedly, if the Court saw any such in the particular case before them, or had reason to suppose that the selection was made for any improper purpose, they would refuse the rule, and require all to be joined; but the motive here is obvious, viz., the avoiding a necessity of moving for two writs, by selecting those two magistrates who were common to both refusals. I think, therefore, that this is not a fatal objection. The third objection was, that Mr. Ellis was not a proper person to be selected, because he is a trustee of the lands. This I think is of no weight, he acted in the matter, and, therefore, is properly joined. The fourth objection was, that the motion was out of time as regards the first refusal: I think this is sufficiently answered by the circumstances which took place in the interval, as detailed in the affidavits. The fifth objection was, that as to the last refusal, the magistrates had no jurisdiction, because the matter was already before the bench of magistrates at Skipton; and *Rex v. Sainsbury* (a) and other cases were cited to shew that where one set of magistrates have possession, as it were, of a case, others cannot interfere. This is very true as a general rule, but in the present instance, the Skipton magistrates being equally divided, had dismissed the case, and a fresh demand was made from the party rated, which makes it quite clear that the Keighley magistrates had jurisdiction. I come now to the merits of the case, and I

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cannot see any real doubt about it. Assuming that the desire expressed in John Drake's will of 1713, amounts to a condition, it is one which the law will not allow to be performed, and the present inhabitants of the township of Keighley are in no way bound by the acts of their predecessors in this respect. Even if the rents were appropriated to the aid of the poor, I should think the condition void to the extent of not exempting the land, much more when it is for the maintenance of a schoolmaster, by which the poor and other inhabitants do not necessarily receive any benefit. I do not profess to determine what effect the non-performance of the condition may have on the rights of the trustees or the parish to the land in question, but I am very clear that the condition cannot legally exempt the beneficial occupier of the lands from being rated to the poor in respect of them. The devise is of certain premises to the township of Keighley, "for the maintenance of a sufficient, unmarried, and qualified schoolmaster, for teaching of children residing and dwelling within the said town and parish of Keighley in the English, Latin, and Greek tongues, which said schoolmaster for the time being shall always teach and instruct children within the said town of Keighley free and without any other reward or stipend whatsoever, and have the rents and profits yearly paid him at Whitsuntide and Martinmas by my executors

aforesaid." But nothing is said about any exemption of such after purchased lands. The lands in respect of which the rates were made are not in the occupation of the schoolmaster, but of a tenant. It appears that they have never been rated. It does not very distinctly appear whether they are the lands actually devised, by the will, or lands purchased with the residue of the personalty, but I will assume that they are the lands devised by the will. There is some little confusion in the will in using the expressions *town* of Keighley and *parish* of Keighley, the township being a part only of the parish, and maintaining its own poor; but I do not think that material. I decide upon the broad ground that the assent of the inhabitants of the township immediately after the death of the testator cannot make a compact binding their successors, and that the lapse of time during which no rate has been made cannot make that valid which was not so originally. As I entertain no doubt on the subject, I think that the rule for a mandamus must be made absolute.

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Rule absolute.

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FOSTER v. The Same.

SWINDLE v. The Same.

LOVETON v. The Same.

COOPER v. The Same.

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SIR JOHN BAYLEY moved for a rule, calling upon the plaintiffs in the above actions to shew cause why further

There being one attorney employed by six several

plaintiffs, in various actions against one defendant, in each of which judgment was obtained, and a writ of execution issued, the whole of the writs were delivered to the sheriff for execution at one time, and in one bundle. The Court refused, upon application by the sheriff, to compel the plaintiffs, or their attorney, to direct in what priority the writs should be executed.

The sheriff having levied under such writs, the whole of the defendant's goods, amounting to 400*l.*, but the aggregate sum to be realized under the writs, being 965*l.*: *Quære*, what would be a sufficient return?

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time should not be allowed to the sheriff of the county of Hertfordshire to return the writs of execution placed in his hands at their respective suits against the defendant, until the plaintiffs or their attorney, Mr. Columbine, should direct in what priority they desired the same to be executed. From the affidavits on which this motion was founded, it appeared that on the 1st of August last, five writs, at the suit of various plaintiffs, were delivered to the sheriff of Hertfordshire, all of which had been sued out by Mr. Columbine, as attorney for the several plaintiffs; upon that occasion an application was made by the under sheriff for instructions as to the priority of the writs, and the desired information was furnished, and the writs were duly executed and returned. On the 8th of October, the clerk to Mr. Columbine again called at the office of the under sheriff, and there delivered in one bundle six writs of fi. fa. at the suit of the plaintiffs above named, the aggregate amount to be levied being 965*l*. An application, such as that which had been made to Mr. Columbine in the previous cases, was now again made, but on the 3rd of November a letter was received from his clerk, in which he refused to give any direction upon the subject. The sheriff, however, had seized under the writs, and it was sworn that it was believed that the goods levied, which were all that could be found belonging to the defendant, would realise

not, by granting it, encourage sheriffs in a lax and careless mode of conducting their business. It was the duty of a sheriff to indorse upon every writ of execution delivered to him, the day of the month and year on which it was so handed over (29 Car. 2, c. 3, s. 16) and if several were given together, it was for him to object, and to say that he would only receive them in fit order of time, and to indorse them accordingly. The plaintiff's attorney, Mr. Columbine, was in no better situation than the sheriff, for he had no authority to prefer the interests of one client over those of another. Each plaintiff, no doubt, was desirous that his writ should have priority of execution, and it was not for the person who was the attorney of all alike to determine how any disputes between them should be settled.

Sir John Bayley, in support of the rule. This was a reasonable application to the discretion of the Court, though a novel one, and if the Court saw that the sheriff was acting *bonâ fide*, it would extend its protection to its officer. There was no pretence that Mr. Columbine would have any difficulty, in fact, in deciding upon the priority of these writs, nor could it be doubted that he could give the information which was required, for as he had signed the judgment, he could, in so far as they afforded the means of forming a judgment, at once relieve the sheriff of the difficulty in which he stood. There was no ground for saying that the sheriff had not done his duty; all that was required by the Statute of Frauds was, that he should "for the better manifestation of the time" at which the writ should bind the property of the debtor, "upon the receipt of any such writ (without fee for so doing) indorse upon the back thereof the day of the month and year whereon he receives the same." He had made the indorsements which were required, but they gave him no information. [*Wightman, J.*—Suppose the sheriff had received six writs from six different attorneys at the same moment, as by the hand of the same messenger, could he

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call on those six attorneys for such information as he now seeks to obtain?] That case might be deemed analogous to the present, and shewed the difficulty of the position of the sheriff. One test which might be here applied was, to ascertain whether a good return could be made by the sheriff in this case; and it was submitted that a return that the sheriff had seized under six writs, and had goods to satisfy a less number, would be bad: and that the sheriff was bound to shew the priority in which he had levied. In *Wintle v. Lord Chetwynd* (a), a rule was obtained for setting aside the return of the sheriff, which was in this form: "By virtue of this and of another writ of fi. fa., to me delivered prior to the receipt of this writ, I have seized and taken in execution goods and chattels of the within-named defendant, which remain in my hands unsold, for want of buyers;" and *Patteson, J.*, in giving judgment, said, "It seems to me that there is a vice in this return, which has not been sufficiently alluded to, namely, that the sheriff cannot return that he has seized goods by virtue of two writs. He cannot do that. It is impossible that he can seize under two, as one of them must have a priority. He ought to state expressly that he has or has not seized goods under the writ (b)." In *Chambers v. Coleman* (c), it was held that it is a sufficient return of a sheriff to a writ of fi. fa., that he has seized goods of the defendant by

mode in which he has received and executed the writs? If it is the dates of the judgments which give priority to the writs, cannot you ascertain what their priority is, as well as Mr. Columbine?] The priority of the writ was determined by the order in which they reached the sheriff (a). [Wightman, J.—I am not satisfied that the sheriff cannot in this case make a good return; there may be some difficulty, but it is not for me to suggest how that should be removed.] The sheriff could make no return without the risk of an action.

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WIGHTMAN, J.—You have not satisfied me that you must make a false return to these writs; at least it appears to me a most extraordinary circumstance, that if the sheriff has done his duty, still he cannot make a good return. I think that one of your great difficulties, that a sheriff cannot make a good return to two writs, is removed by the case of *Chambers v. Coleman*, which you have cited. It does not appear from that case, that if the sheriff has seized under different writs, he cannot return that he has so seized, and that he must necessarily state their priority. There, the priority of the writs is set out in the return, and the sheriff says, that the goods seized are unsold, and insufficient to satisfy all of them. Now, here he may say, that he has seized all the goods of the defendant, and he cannot sell the priority of the writs, because they were all delivered to him at the same moment of time. That will be true in fact, but whether the return will be a good return, I will not say. This rule, however, must be discharged.

Watson prayed for costs.

WIGHTMAN, J.—No! the plaintiffs' attorney has adopted a very unusual mode of proceeding; if he had delivered

(a) Vide *Wintle v. Freeman*, 11 Ad. & El. 539; *Heenan v. Evans*, ante, vol. 1, p. 204, N. S.

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the writs in the ordinary manner, this difficulty would not have arisen.

Sir *John Bayley*. The sheriff had been ruled to return the writs. He asked for time to make the return.

WIGHTMAN, J.—Let there be four days' time given to make the return.

Rule discharged without costs.

REGINA v. THOMAS GOODALL.

The officers of a parish having taken proceedings under the 2 & 3 Vict. c. 85, s. 1, before justices in petty session to procure the reimbursement of certain sums expended in the maintenance of a bastard child, of which the

F. V. LEE moved for a rule calling upon certain justices of Staffordshire to shew cause, why a certiorari should not issue to bring up the recognizances of the defendant, and the order of Quarter Sessions made in this matter, in order that the same might be quashed. The order was made upon the applicant, Thomas Goodall, as the putative father of a female bastard child, born on the 2nd of August, 1842, in the parish of Wolstanton, Staffordshire. The 4 & 5 Wm. 4, c. 76, s. 72, provides, that "when any child shall

defendant was alleged to be the father; and the defendant having required that the charge

be hereafter born a bastard, and shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general Quarter Sessions of the peace, &c., for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such parish or union for its maintenance and support," &c. The 2 & 3 Vict. c. 85, s. 1, enacts, "that when any child (which has been born a bastard since the passing of the 4 & 5 Wm. 4, c. 76,) shall, &c., the guardians of any parish, or of the union in which such parish may be situate; or, if there shall be no such guardians, then the overseers of such parish may, if they think proper, &c., apply to the justices of the peace, holding any Special or Petty Session, &c., for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such union or parish for its maintenance and support," &c. Section 3 provides, "That if the person whom the guardians or overseers shall charge with being the putative father of such child, shall declare to the justices, in such Special or Petty Session, that he is desirous that the charge shall be heard and determined at the Quarter Sessions of the peace, and shall then and there enter into a recognizance with two sufficient sureties, conditioned personally to appear at the Quarter Sessions of the peace then next or next but one ensuing, as the justices shall think fit, to answer to the said charge, &c., then the justices in Special or Petty Session shall not proceed further to hear the charge, but shall take such recognizance and transmit it to the clerk of the peace: and in such case all further proceedings, in the matter of such charge, shall be had before the said Court of Quarter Sessions," &c. In the present case, the parish officers had taken proceedings under the latter act, against the defendant, and certain ob-

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jections were made to the notice given to him to appear before the magistrates, and also to the recognizances into which he had entered. The order of sessions, however, recited, that it had been "duly certified to this Court, that the said Thomas Goodall, &c., having had due notice to appear, &c., did, at such Petty Session, enter into a recognizance," &c. Neither the notice nor the recognizance appeared on the face of the order, and the question was, whether the objections could be now taken to them, which were sought to be raised? [*Patteson, J.*—No, you cannot take those objections now, as they do not appear on the face of the order.] Then, secondly, the order of session recited, that "whereas the parish of Wolstanton, in the county of Stafford, is situated within the division of Pirchill North, in the said county; and whereas it hath been duly certified to this Court, that at a Petty Session holden at Longton, in the said county, on the 7th September, the guardians and overseers of the poor of the parish of Winstanton, did then and there make information and application," &c. From the affidavits, in support of the motion, it appeared that Wolstanton, was a part of the Wolstanton and Burslem Union, and that although each parish returned a certain number of guardians, to act in the Union; they did not so act in respect of their own parish alone, but in the discharge of the general duties of

to have made the complaint, and the rest may be rejected as surplusage.] Thirdly, the order of sessions after stating the application to have been made by "the guardians and overseers of the poor of the said parish of Wolstanton;" stated, that "they the said guardians and overseers, after diligent inquiry, did charge Thomas Goodall, of Talk o' the Hill, in the parish of Audley, in the said county of Stafford, with being the putative father of the said bastard child, and did, at the same petty sessions further apply to the said justices for an order upon the said Thomas Goodall, &c., to reimburse such parish for the maintenance and support of such child," &c. Here, the last antecedent to "such parish," was the parish of Audley, but the parish of Wolstanton was that to which reference ought to be made.

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PATTESON, J.—I think that we must put a reasonable construction upon the words employed, and that will carry the meaning back to Wolstanton.

Rule refused.

REGINA v. THE JUSTICES OF MIDDLESEX.

CLEASBY shewed cause against a rule for a mandamus to be directed to the justices of the county of Middlesex, commanding them to issue their warrants of distress for levying the goods of certain persons, the occupiers and inhabitants of rateable property at Hampton, in respect of a rate made for the relief of the poor of the parish in which they resided. The property, in respect of which it was sought to have these warrants issued, was that which was comprised within the palace of Hampton Court; the question of the liability of the property to be rated, had

Where in answer to an application for a mandamus against magistrates, commanding them to issue distress warrants to levy a poor rate, it was suggested that the warrants would be to be executed within Hampton Court Palace, and that the officers

of the Crown claimed that the property was exempt from the operation of such warrants, and threatened proceedings if they were executed, the Court nevertheless granted the writ, and refused to call upon the applicant parish to give the magistrates an indemnity against the consequences of any proceedings which might be taken.

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been already argued and determined in Easter Term, 1842, and the magistrates, upon whom this rule had been served, were willing to issue their warrants, but having been informed that some further question would arise, the property belonging to the Crown, and that the officers of the Crown would further dispute the liability of the property to pay the rates, they sought that an indemnity might be given to them, by which they should be relieved from the consequences of any personal responsibility arising out of any new proceedings. [*Wightman, J.*—It is not at all a matter of course that we call upon parties in the situation of this parish to give an indemnity.] The magistrates were exposed to the certainty of an action, if they granted the warrants which were required of them; and it was but just that those who were interested in the result should bear the costs, of any proceedings which might be taken.

Erle, in support of the rule. The magistrates were called upon to act in the execution of their duty, and they had assumed the responsibilities of their office when they accepted its honors. The difficulty which was anticipated might not arise. The Court had already decided that the inhabitants of the palace at Hampton Court were liable to pay the rates; the warrants of the magistrates, therefore, would be legal, and the question to be raised might be,

the rule must be made absolute. The Court have already decided on the validity of the rate; the ground of objection on the part of the magistrates is, that their warrant being to be executed within Hampton Court, it may possibly subject them to proceedings. The order of the magistrates would be simply to levy on the goods and chattels of the persons named in the writ. I think, therefore, the writ must go.

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Rule absolute.

FARMER v. CROSS.

HUGH HILL shewed cause against a rule for judgment as in case of a nonsuit. He produced an affidavit sworn by the clerk to the London agent of the plaintiff's attorney, from which it appeared that it was a country cause, and who swore "that he had been informed, and verily believed that the plaintiff had not been prepared with sufficient evidence to go to trial." This it was urged, upon the authority of *Doe dem. Ringer v. Blois (a)*, was a sufficient excuse.

Where in answer to a rule for judgment as in case of a nonsuit in a country cause, it was sworn by way of excuse, by the clerk to the London agent of the plaintiff's attorney, that he had "been informed, and verily believed that the plaintiff was not prepared with sufficient evidence to go to trial;" the Court discharged the rule upon a peremptory undertaking.

Rawlinson, contra.

WIGHTMAN, J.—From the case cited, the excuse would appear to be sufficient. The rule must be discharged, the plaintiff giving a peremptory undertaking.

Rule accordingly.

(a) *Ants*, vol. 8, p. 18, O. S.

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Ex parte BROMLEY.

Where an articulated clerk had been examined, and had obtained his certificate of fitness from the examiners in T. T., 1841, and did not take any further steps to procure his admission as an attorney, and did not within the next Term apply for an extension of the time during which his certificate should run, the Court in M. T., 1842, held that the operation of the certificate had ceased, and refused to make an order for its revival.

MILLER moved on behalf of the applicant that he might be admitted an attorney. From the affidavit of Mr. Bromley, it appeared that he had been duly examined in Trinity Term, 1841, and had obtained the examiners' certificate of fitness, in accordance with the Reg. Gen., E. T., 6 Wm. 4 (*a*). The applicant had proceeded thus far towards his admission, in the belief that he might then be able to enter into a desirable partnership, with a view to which, negotiations were pending; but those negotiations having been broken off, he had since that time taken no further steps towards procuring his admission, but had continued as a clerk in the service of an attorney. The question was, whether the force of the certificate, which had been obtained from the examiners in Trinity Term, 1841, could be now extended by the Court so as to warrant the admission of the applicant at the present time? The rule of Court having required a certificate to be obtained, declared "such certificate to be in force only to the end of the Term next following the date thereof; unless such time shall be specially extended by the order of a Judge."

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FEATHERSTONE v. BOURNE.

MILMAN shewed cause against a rule for judgment as in case of a nonsuit. From the affidavits, it appeared that issue was joined in May, 1842, but that in the month of September following, the defendant filed a petition for his discharge under the Insolvent Debtors' Act, and that in the course of the same month he delivered his schedule, in which the plaintiff's claim in this suit for 200*l.* was set down as an admitted debt. He submitted that the plaintiff was entitled to a *stet processus*.

Where in answer to a rule for judgment as in case of a nonsuit, affidavits were produced, stating that since issue joined, the defendant had applied for relief to the Insolvent Court, and had filed his schedule, in which the plaintiff's debt was admitted; the Court discharged the rule with costs, even though it was not sworn that the plaintiff was not aware of the defendant's insolvency before the commencement of the suit.

Wordsworth, in support of the rule. The facts stated afforded no answer to this motion. It was consistent with the affidavits, and with the fact of the insertion of this debt in the schedule, that it was not a good debt. In *Smith v. Davis* (a), the Court of Common Pleas, upon a similar motion, refused to award a *stet processus* where the defendant had become insolvent since the commencement of the suit, and it did not appear that the plaintiff was unaware of the defendant's insolvency before action brought.

PATTESON, J.—The rule must be discharged with costs. If the defendant were merely said to be insolvent the case might be different. Here, however, the plaintiff's debt is admitted in the schedule, and the defendant admits himself to be insolvent.

Rule discharged, with costs (b).

(a) *Ante*, vol. 9, p. 50, O. S.; S. C. 2 Scott, N. R. 189.

(b) Vide *Lemon v. Hopson*, *ante*, vol. 6, p. 795, O. S.

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FOSBERY v. BUTLER and LAWRENCE.

Where in a country cause, the plaintiff had given notice of trial for the Summer Assizes, and the defendant subsequently applied to him, and expressed a wish to settle the action, and was supplied with the terms upon which the plaintiff would consent to such settlement, and pending the negotiation, the time in which the cause could be tried passed over, and the defendant subsequently obtained a rule for judgment as in case of a nonsuit, the Court discharged such rule with costs, as having been obtained against good

BUTT shewed cause against a rule nisi, obtained on behalf of the defendant, for judgment as in case of a nonsuit. He produced an affidavit, from which it appeared that notice of trial had been given by the plaintiff for the last assizes for the county of Wilts; that after such notice had been given, the plaintiff's attorney had an interview with the defendant Butler, who expressed a wish to settle the action, both on his own account, and on the account of Lawrence, his co-defendant: that at the request of the defendant Butler, the plaintiff's attorney furnished him with a statement of the amount of costs which the plaintiff had incurred in the suit, and of the terms upon which the plaintiff would consent to settle the action; that the defendant having received such statement promised to forward to the plaintiff an answer containing his determination with regard to the settlement of the action, and that during the time occupied in this negotiation, and after such statement had been furnished, the time passed at which the plaintiff could have tried the cause. It was urged that this motion was against good faith, and that the Court would discharge the rule with costs. *Alford v.*

Butler, who, for anything that appeared, was unauthorized by him to make any proposition for settlement.

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PATTESON, J.—It appears from the affidavits that the negotiation for the settlement of the action was still in force and operation at the time when the cause would have been tried; the defendants must have known why it was that the plaintiff did not go to trial. The case comes within the authority cited of *Alford v. Fellowes*, which is supported by reason and justice. The rule must be discharged with costs.

Rule discharged, with costs.

COULSON v. CLUTTERBUCK.

J. W. SMITH moved for a rule to set aside judgment signed upon a warrant of attorney, and a writ of execution issued thereon. The instrument authorized the plaintiff to sign judgment "as of last Easter Term, or any subsequent Term;" judgment had been signed in Vacation, and had not been signed as of any Term, but in the ordinary form under the Reg. Gen., H. T., 4 Wm. 4, s. 3 (a), which directs, that "all judgments shall be entered of record, of the day of the month and year, whether in Term or Vacation, when signed, and shall not have relation to any other day." In the case of *Cobbold v. Chilver* (b), a warrant of attorney authorized the plaintiff to sign judgment "as of last Hilary Term, next Easter Term, or any subsequent Term," and the Court held, that a judgment signed in Vacation was irregular. The present application was made on behalf of the plaintiff, and from the affidavits it appeared that no step had been taken on the judgment, except that of suing

A warrant of attorney, authorized a plaintiff to sign judgment "as of" a Term; he signed judgment under the Reg. Gen., H. T., 4 Wm. 4, s. 3, in Vacation, and in the manner directed by that rule; the plaintiff having discovered that his judgment was irregular, and having taken no proceeding upon it, except that of suing out a writ of fi. fa., which, however, had not been executed, the Court, upon his application, granted him a rule absolute in the first instance, for setting aside his judgment.

(a) *Ante*, vol. 2, p. 312, O. S.

(b) *Ante*, vol. 1, p. 726, N. S.

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out a writ of fi. fa., upon which, however, execution had not been executed. The plaintiff sought to obtain a rule absolute in the first instance.

PATTESON, J.—I see no objection whatever to your application.

Rule absolute.

Doe dem. ROGERS v. ROE.

The Court refused to grant a rule for judgment against the casual ejector, where the declaration served upon the tenant in possession was dated of a wrong year, the notice bearing no date; even though the service had been personally effected in the month of September, and the notice required the tenant to appear "next Michaelmas Term."

PRIDEAUX moved for judgment against the casual ejector. The declaration was dated of T. T., 6 Vict., instead of 5 Vict.; the notice which was appended to it was not dated, but it required the tenant to appear "next Michaelmas Term." Personal service had been effected on the tenant in the month of September. He admitted that there had been cases in which the Court had refused to grant similar motions under like circumstances, but he relied upon *Doe dem. Greene v. Roe (a)*, and *Doe dem. Crooks v. Roe (b)*, which had not always been cited upon previous motions, and which were precisely in point (c).

Cur. adv. vult.

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Doe dem. BRITTON and Others v. CLARK.

DUNDAS and **ADDISON** shewed cause against a rule obtained on behalf of the defendant for setting aside an award. They objected to the insufficiency of the affidavit verifying a copy of the award. The affidavit purported to be that of Mr. Oscar Salmon, a clerk to the defendants' attorney, and it commenced thus, "Oscar Salmon, of, &c., maketh, and saith," &c., the word "oath" being omitted. Upon the authority of *Oliver v. Price* (a), it was contended that this was an objection which was fatal to the motion. There, the same objection arose upon a motion for a rule nisi, and the rule was refused. It was submitted that the omitted word was essential, and that without it, the instrument produced could not be described as an affidavit.

An affidavit commencing thus, "O. S., of, &c., maketh and saith," the word "oath" being omitted, will not be received by the Court, even though it purports by the jurat to have been duly sworn.

Kelly and *Crompton*, in support of the rule. The case cited was not such an authority as would induce the Court to discharge this rule. There, the objection was raised upon an application for a rule, and the deficiency was easily supplied, and the application renewed, but the effect of discharging this rule upon such a ground would be to deprive the defendant of any further opportunity of impeaching the award which he sought to set aside (b). The jurat, however, removed the objection, because, by that it appeared that the instrument was sworn. [*Wightman*, J.—It does not appear by whom it was sworn.] It purported to be the affidavit of Mr. Oscar Salmon, and when that was taken with the jurat, there could be no doubt that it was sworn by him. The true test by which the matter might be tried was, whether perjury could be assigned on such an affidavit, and it was submitted that it

(a) *Ante*, vol. 3, p. 261, O. S. vol. 8, p. 307, O. S.; *Sherry v.*

(b) *Vide Regina v. Jones*, *ante*, *Oke*, *ante*, vol. 3, p. 349, O. S.

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could. It purported to be the affidavit of Mr. Salmon, it was stated by the jurat to have been sworn, and opposite the jurat the name of Mr. Salmon was written as the deponent. But further, there was appended to the copy of the award this memorandum, "This is the copy of the award referred to in the annexed affidavit of Oscar Salmon, sworn before me this 30th of May, 1841, (signed) WM. WIGHTMAN." This, therefore, was a certificate of the learned Judge, both that the copy of the award was the same intended to be verified, and that the affidavit was sworn.

WIGHTMAN, J.—Pending this argument, I have communicated with the Judges sitting in the full Court (*a*), and they think that I ought to act upon the authority cited. I confess if it were not for that case, I should have very great doubt upon the question. Under the circumstances, the rule must be discharged, without costs.

Rule discharged, without costs.

(*a*) Lord DENMAN, C. J., WILLIAMS, J., and COLERIDGE, J.

as to that writ. From the affidavit, it appeared that the present action having proceeded to issue, upon the ordinary footing, it stood for trial at the Summer Assizes of the year 1841, for the county of Surrey. On the 30th of July, 1841, the plaintiff obtained the order of *Patteson*, J., at Chambers, that he should be at liberty to prosecute the suit in formâ pauperis; this order was served on the defendant's agent in London, at three o'clock on the commission day of the Assizes; the cause came on to be tried in its course, and the plaintiff was nonsuited: in the following month of November, the plaintiff's attorney was served with an appointment to tax the costs; and after two fresh appointments had been served, neither of which was attended, the defendant's costs were at length taxed by the Master, in the absence of the plaintiff and his attorney, down to the date of the order of the learned Judge; the plaintiff's attorney was subsequently informed of the taxation by the attorney of the defendant, and was told that execution would be sued out against his client, but no notice was taken of this intimation, and at length a *ca. sa.* having issued on the 22nd of August, the plaintiff being already in the custody of the sheriff of Surrey, he was charged in execution at the suit of this defendant. This was the execution in respect of which it was demanded by this rule that the plaintiff should be discharged. The present rule had been moved upon the grounds, first, that the order of the learned Judge, authorizing the plaintiff to sue in formâ pauperis, was retrospective in its operation, and dated back to the commencement of the suit, and that therefore the plaintiff was not liable to pay any costs; secondly, that it appeared on the face of the writ of *ca. sa.*, that the sheriff was directed to levy 30*l.*, the amount of the costs, together with interest at the rate of 4*l.* per cent., and that interest could not be recovered upon a judgment for costs; and, thirdly, that the writ was indorsed to levy 30*l.*, and interest, 16*s.* the expense of the writ, besides sheriff's poundage, officer's fees, &c., in which respect it was clearly irregular.

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Whitehurst now shewed cause. First, this application came too late, as in effect it was a motion for a review of the Master's taxation of costs, and the taxation having taken place in November, 1841, the Court would not now entertain a motion for that purpose. But secondly, the taxation, and the writ of *ca. sa.* issued upon the Master's allocatur were justified, because, although the plaintiff had obtained the order of a learned Judge, that he should be admitted to sue in *formâ pauperis*, that order took effect only from its date, and had no relation back to the commencement of the suit. At common law, neither plaintiff nor defendant were entitled to costs, but the difficulty in which parties were placed in this respect was remedied so far as plaintiffs were concerned by the Statute of Gloucester, 6 Edw. 1, c. 1, which enacted, that in all actions in which the plaintiff recovered damages, he should also recover against the defendant his costs of suit. The 11 Hen. 7, c. 12, first gave the Judges authority to permit poor persons to sue in *formâ pauperis*, and provided that "every poor person, who shall have cause of action against any person, shall have by the discretion of the Chancellor for the time being, writ or writs original, or writ of *subpœna*, according to the nature of their causes, paying nothing for the seals of the same, nor to any person for the writing of the same writ or writs," &c.

but shall suffer other punishment as by the discretion of the justice or Judge afore whom such suits shall depend, shall be thought reasonable," &c. It might, under these provisions, be considered somewhat doubtful whether a plaintiff could be admitted to sue in formâ pauperis, pendente lite, and if that were so, it was clear that the plaintiff in this case was liable to the costs, in respect of which he had been charged in execution; but at all events, even supposing that such an order might be made after the commencement of the action, the statutes gave no authority to the Judge making the order to engraft upon it any term by which the pauper should be relieved from costs precedently incurred. The statute 4 Jac. 1, c. 3, extended the provisions of the 23 Hen. 8, c. 15, but contained no enactment bearing upon the particular question now at issue. The first case to be found on this question was in *Moseley's Reports*, p. 68, where it was laid down that a person, by getting himself admitted a pauper, cannot discharge himself of costs to which he was liable precedent to his admission. *Wilkinson v. Belsher* (a), was to the same effect. In *Blood v. Lee* (b), a case of *Pats v. Holiday*, was cited by *Wilmot*, C. J., in which it was "at first doubted whether a plaintiff could be admitted in formâ pauperis after the commencement of the suit; but at length it was resolved that he might be so admitted at any time of the suit; and the Court resolved that a person so admitted, pendente lite, shall not pay costs from the beginning of the action," but *Parke*, B., in giving judgment in *Casey v. Tomlin* (c), where those cases were referred to, sanctioned the supposition that where a party was admitted in formâ pauperis, pendente lite, it was only on condition of his being held liable to pay the costs antecedently incurred. In *Jones v. Peers* (d), where an order was made, pendente lite, admitting the plaintiff to sue in formâ pauperis, and an application for security for the costs previously incurred was not

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(a) 2 Brown's C. C. 272.

8, p. 892, O. S., S. C.

(b) 3 Wils. 24.

(d) M'Clel. & Yo. 282.

(c) 7 M. & W. 189; *Ante*, vol.

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made until two years afterwards, the Court refused the application, and allowed a retrospective operation to the order; and in a note to that case the practice was stated to be that an absolute order of admission was made without any previous security being required; but on service of the order on the defendant's solicitor, he may proceed, if he think fit, to compel the usual security. From that case, however, it appeared as if the practice had been that the order should not have a retrospective effect, and that it was only by the neglect of the defendant that such an operation was there given to it (*a*). *Lovewell v. Curtis* (*b*), and *Foss v. Racine* (*c*), were decisions of the Court of Exchequer, which favored the presumption first urged that the plaintiff could not be admitted a pauper after the commencement of the suit. Secondly, it was objected that the writ of *ca. sa.* was irregular, because it directed the amount of costs, with interest thereon, from the date of the judgment, to be levied. By 1 & 2 Vict. c. 110, s. 18, it was provided, "that all rules of Court, whereby any sum of money or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments;" and by section 17 of the same statute it was enacted, that "every judgment debt shall carry interest at the rate of 4*l.* per centum per annum, from the time of entering up the judgment, &c., and such interest may be levied under a writ of

was not entitled to levy sheriff's poundage, and officers' fees, but it was urged that this was no ground for setting aside the writ, or for discharging the plaintiff out of custody under the existing state of things. If the plaintiff had tendered all that was due except these charges, and he was detained in custody in respect of them, he might then come to the Court with such a motion; but at present he could obtain nothing but the erasure from the writ of those words of which he complained. The indorsement on a writ of *ca. sa.* besides, formed no part of the writ itself, and the writ was not vitiated by any irregularity therein. He cited *M'Cormack v. Melton* (a).

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Pearson, in support of the rule. First, the proposition contended for that a party could not be admitted to sue as a pauper, after the commencement of the suit, was distinctly negatived, and the cases which had a contrary tendency overruled, by the recent decision of the Court of Common Pleas, in *Brunt v. Wardell* (b). [*Patteson, J.*—That affords no reason why a party who is admitted a pauper shall not pay the costs previously incurred]. The defendant, at the time of the admission of the pauper, ought to have called upon him for an undertaking to pay any such costs, and as he had omitted to do so, the Court would not now impose such a term on the plaintiff. That such was the practice, was to be collected from the case of *Jones v. Peers* already cited; from *Doe dem. Allis v. Owens* (c) recently decided in the Court of Exchequer, in which *Brunt v. Wardell* was recognised, and in which the question here raised was argued, but not decided, and from *Rice v. Brown* (d). Secondly, the statute 1 & 2 Vict. c. 110, s. 17, applied to judgments for debts only, and not

(a) 1 Ad. & El. 331.

(b) *Ante*, vol. 1, p. 229, N. S.;
S. C. 4 Scott, N. R. 188.

(c) *Ante*, vol. 1, p. 404, N. S.;
9 M. & W. 455.

(d) 1 Bos. & P. 39. Vide also
the judgment of *Coleridge, J.*, in
Morgan v. Eastwick, *ante*, vol. 7,
p. 543, O. S.

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to judgments for costs. Thirdly, the decision in *M^r Cormack v. Melton* had no bearing on this case: if the Court saw that the plaintiff was damnified by his being detained in custody for too large an amount, it would make the rule absolute for his discharge.

Cur. adv. vult.

PATTESON, J.—This was a motion to discharge the plaintiff out of custody under a *capias ad satisfaciendum*, for the costs of a nonsuit. The plaintiff had been admitted to sue in *formâ pauperis*, by an order of mine, which was not served till the afternoon of the commission day for the assizes in Surrey, where the cause was to be tried. The Master has allowed only the costs antecedent to such service. It is now contended by the plaintiff, that the order had a retrospective effect, and exempts him from all costs; and that, at all events, the defendant should first have applied to dispauper the plaintiff before he could have costs. On the other hand it is argued, from some cases decided in the Court of Exchequer, that the admission to sue in *formâ pauperis* in the midst of the suit is invalid, and that the Master might have allowed all the costs even subsequent to the service of the order. The last decisions in the Court of Exchequer do not go that length, and I am not called upon to enter into that question, for the

costs, unless the admission be retrospective; it is said to have been held so in one or two cases, but they are of very doubtful authority, and I am quite satisfied that the law is otherwise, and that the Master has done quite right. As to an application to dispauper, it is plainly necessary only where the costs sought would otherwise be covered by the rule, which is not the case here. Another objection was made that the *capias* is indorsed for interest on the judgment: the answer is, that the statute 1 & 2 Vict. c. 110, s. 17, gives interest on all judgments. Another objection was made, that the *capias* is indorsed to levy poundage and fees. This is clearly wrong, and if the rest of the judgment were paid, and the plaintiff detained for poundage and fees, he would be entitled to his discharge, but it does not vitiate the writ itself. The rule must be discharged, but without costs.

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Rule discharged, without costs.

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SNAPE v. The Earl of WALDEGRAVE.

PEACOCK moved for a *distringas* to proceed to outlawry against the defendant. The affidavit disclosed several applications to have been made to Mr. George Robins, the agent of the defendant, to Mr. Pearson, his attorney, and to a Dr. Daniel, who was stated to have the management of his affairs in this country, with a view to induce them to accept service of a writ of summons on behalf of the defendant, which, however, were unsuccessful; it then proceeded to state that the deponent had gone to Strawberry Hill, near Richmond, the last known residence of the defendant, for the purpose of serving the defendant with a copy of the writ of summons, when he saw a Mrs. Hopkins, who was in charge of the premises, and who stated that the defendant was abroad.

The Court will not grant a *distringas* to proceed to outlawry against a peer, having privilege of Parliament; but where, on an application for such a writ, there were sufficient materials brought before the Court to justify, in an ordinary case, the issuing of a writ of *distringas* to outlawry, a *distringas* to compel an appearance was granted.

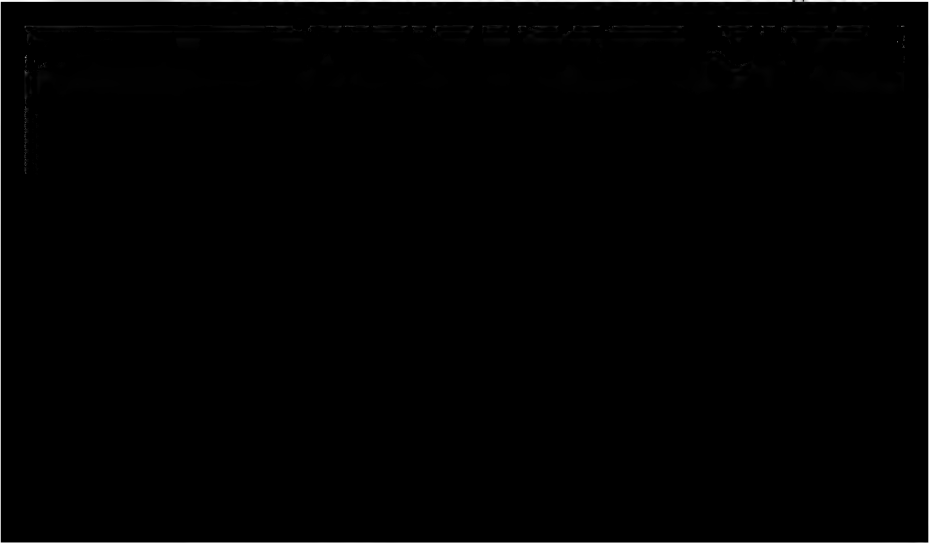
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PATTESON, J.—In *Cassidy v. Stuart* (a), the Court of Common Pleas held, that in an action against a member of Parliament, it is not competent for the plaintiff, either upon mesne or final process, to sue out writs for the purpose of proceeding to outlawry, although he may have no present intention of putting them in execution. There it was admitted that such process would not issue against a peer; and the Court, in giving judgment, held that process to outlawry could not be issued against any person, who was not liable to a *capias ad respondendum*. That case is strong to shew that your application cannot be granted.

Sir *John Bayley*, *amicus curiæ*, mentioned a case in which the Court of Exchequer had granted a *distringas* to compel appearance against the Earl of Lichfield. (b)

On a subsequent day,

PATTESON, J., said, I have mentioned this case to the Judges of the Court of Exchequer, as well as the case referred to by Sir *John Bayley*. That application passed *sub silentio*, but we are all agreed that a *distringas* to proceed to outlawry will not go against a peer. There have been several cases, I understand, in which parties have been in the same situation with the plaintiff here, where the circumstances have been insufficient to warrant a *distringas* to



Court would, under these circumstances, view a case in which a peer was a defendant, as an instance excepted from the rule generally acted upon, and that the plaintiff would be permitted to sue out a *distringas* to compel appearance upon the materials with which he was here provided, although in an ordinary case they would be sufficient only to proceed to outlawry. *Taylor v. Lord Stuart de Rothsay* (a) was an authority in support of this view of the case, because there, although it distinctly appeared that the defendant was abroad, the Court of Common Pleas granted a *distringas* to compel appearance. [*Patteson, J.*—But if you ask for a *distringas* to compel appearance, should you not be provided with the ordinary affidavit, stating three calls and two appointments?] It would be a mere farce to go through the form of calling and making appointments at the residence of the defendant, who was known to be in Italy.

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PATTESON, J.—Certainly that observation arises. Under the circumstances you may take a *distringas* to compel appearance.

Writ granted (b).

(a) *Ante*, p. 121.

(b) A similar application was made before *Williams, J.*, in Hilary Term, 1843, by *Fitzgerald*,

in a case of *Bigge v. The Earl of Tankerville*, which was granted upon the authority of the above decision.

BYRNE v. MANNING.

THESIGER and *Busk* shewed cause against a rule obtained on behalf of the defendant, for setting aside the *Quære*, how far the rule will be maintained, which prevents an outlaw from appearing in Court for any other purpose than to reverse his outlawry; and whether he will not be permitted to appear to avoid proceedings against himself, although he cannot enforce any demand of his own.

Where a defendant applied to set aside a warrant of attorney at a time when the plaintiff had already taken proceedings to outlawry, and pending the rule nisi, the outlawry was completed, the defendant was held to be entitled to come in to make his rule absolute.

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warrant of attorney, and the judgment signed thereon in this case. The ground on which the rule had been moved was, that the warrant of attorney had been given as a collateral security for the payment of an annuity granted by the defendant to the plaintiff, who was further secured by an indenture of which no memorial had been enrolled in the Court of Chancery within thirty days of its execution, pursuant to the statute 53 Geo. 3, c. 141, s. 2. It was admitted, that under the authorities of *Ex parte Lewis and Wife* (a), and *Huggins v. Coates* (b), the objection raised must prevail; but it was contended that the defendant, being now an outlaw, was incompetent to appear before the Court to get rid of the liability which had accrued against him on these instruments. Upon the cases of *Summervil v. Watkins* (c), *Loukes v. Holbeche* (d), and *Aldridge v. Buller* (e), it had been supposed that it was incompetent for an outlaw to appear in Court for any purpose except to reverse his outlawry, but in the recent case of *Hawkins v. Hall* (f), the Master of the Rolls had drawn a distinction between the case of an outlaw seeking to establish a demand, and seeking to avoid a liability; and had held, that although in the former case an outlaw could not appear in Court, in the latter it was competent for him to seek protection from the law. The cases of *Loukes v. Holbeche*, and of *Summervil v. Watkins*, were instances in

had adopted the reasoning of Lord *Langdale*, and there, upon a motion to set aside a writ of sci. fa. on a judgment, the defendant, who was an outlaw, was permitted to come in to object to the proceedings, on the ground that a previous sci. fa. and judgment thereon was not recited in the second sci. fa. It was submitted, however, that the cases of *Hawkins v. Hall*, and *Walker v. Thellusson*, would not bind the decision of the Court, but that the principle which they laid down would be deemed still open for argument; first, because they were respectively decisions of single Judges, and not of a whole Court, as in *Loukes v. Holbeche*, and *Summervil v. Watkins*; and secondly, because in a case like the present, it would be most injurious and dangerous to unsettle a principle of law which had been so long established.

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Platt and *Hance*, in support of the rule. The rule adopted by Lord *Langdale* in *Hawkins v. Hall*, and by *Williams, J.*, in *Walker v. Thellusson*, was a reasonable rule to which the Court would be disposed to adhere. The old rule had this effect as regarded outlaws, that it rendered them liable to answer every complaint, but that it prevented them from making complaint themselves, and from combating unjust demands. This was an anomaly which the Court would no longer sanction. But, secondly, there was nothing before the Court to shew that at the time when this rule was obtained, the defendant was in reality an outlaw. The application for the rule was made on the 9th of June, 1842, in Trinity Term; by his affidavit then produced, it was sworn that the plaintiff had taken proceedings on the judgment "for the purpose of proceeding to outlawry." The affidavit of the plaintiff, in answer to this rule, was dated the 28th of October, 1842, and from that there was nothing to shew when the outlawry was complete. It must be taken, therefore, that the defendant came to the Court before he was an outlaw, and his having since become outlawed, could make no difference in reference to his rights on this motion.

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Thesiger. The rule was drawn up with a stay of proceedings; the Court would not presume that the plaintiff had disobeyed the rule, and had since then taken any steps in the cause against the defendant. If that were so, and the defendant was now an outlaw, he must have been so before the rule was moved.

PATTESON, J.—It is not necessary for me to enter into the general question which has been argued by Mr. *Thesiger* of the right of an outlaw to appear in Court, for the purpose of getting rid of any irregular or illegal proceedings against him; though certainly the old rule does, as Mr. *Platt* has contended, place an outlaw in this position, that he shall answer to all, and that none shall answer to him. I think, however, that I must take it, in this case, that at the time the motion was made, although proceedings to outlawry had been taken, the defendant was not actually an outlaw; and if so, the question on those cases does not arise. I can hardly conceive any case to go the length of saying, that if a party applies to set aside proceedings, not being an outlaw, and if he is afterwards made an outlaw, he cannot be heard in support of his application. I do not stop to consider whether in an action, if the plaintiff is outlawed after action brought, there can be a plea stating that fact, puis darrein continuance, but I think that this

Thesiger urged that the defendant could only have his rule made absolute on payment of costs. The case was analogous to an application by a defendant to reverse his outlawry.

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PATTERSON, J.—No, he appears in sufficient time to raise his objection before his outlawry. All that I can do is to make the rule absolute in its terms.

Rule absolute, without costs.

Doe dem. LLOYD v. ROE.

PASHLEY moved for a fresh writ of possession in this cause. It appeared that judgment having been signed against the casual ejector, in Trinity Term last, a writ of possession was issued, and two tenants, who were in possession of the premises in question, were ejected. The sheriff gave up possession to the lessor of the plaintiff, but within a few days the tenants came again, and forcibly expelled his agent, and took possession again. The writ of hab. fac. poss. had not yet been returned. He cited *Doe dem. Thompson v. Mirehouse* (a), and *Tidd's Prac.*, vol. 2, p. 1247, 9th edit.

Where in ejectment, a writ of habere facias possessionem has been executed in respect of the premises in question, and possession has been given to the lessor of the plaintiff, but the tenant subsequently comes and forcibly dispossesses him, the Court will grant a new writ, but the rule for such writ is only nisi in the first instance.

WIGHTMAN, J.—It is a rule nisi only.

Pashley urged that he was entitled to a rule absolute in the first instance, but this being refused, he engrafted on the rule nisi a term calling on the tenant to shew cause why he should not restore possession of the premises.

Rule nisi accordingly.

(a) *Ante*, vol. 2, p. 200, O. S.

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REGINA v. WHISTON and Others.

Upon an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for demolishing a house, it appeared in evidence that the means of destruction used was fire; an objection was thereupon taken that the indictment was not sustained, which, however, was overruled, and the prisoners were convicted and sentenced to transportation: The Court refused to grant a writ of certiorari to bring up the record of the conviction, with a view to proceedings to cause it to be quashed.

PRICE moved for a writ of certiorari, to remove into this Court the record of the conviction of the defendants in this indictment, with a view to further proceedings being taken to procure the same to be quashed. The indictment was preferred at a session of oyer and terminer, held by special commission at Stafford, in the month of September, 1842, and it charged (under the statute 7 & 8 Geo. 4, c. 30, s. 8), that the defendants, on the 15th of August, being unlawfully, riotously, and tumultuously assembled together, did feloniously, unlawfully, and with force, demolish and pull down the dwelling-house of one Benjamin Vale, clerk, &c. The indictment was tried before *Tindal*, C. J., and the evidence which was adduced shewed that the defendants had entered the house of Mr. Vale, and that they had set fire to and burned a number of articles of furniture belonging to him, and that the flames from them had communicated to the wood work of the house, which was partially destroyed thereby. It was, therefore, submitted on behalf of the prisoners, that the indictment was not sustained by the evidence, and that the prisoners must be acquitted; but the learned Lord Chief Justice overruled the objection, and refused to reserve the point for future

The indictment, it was submitted, was not sustained by the proof which had been given; for a demolition of a house by fire did not come within the meaning of that clause of the statute under which this indictment was framed, the words of which were imported into the indictment itself. The offence of arson was altogether distinct from that of demolition, and formed the subject of a separate section (s. 2) of the statute of Geo. 4, and of a more recent provision, 7 Wm. 4, and 1 Vict. c. 89, s. 3. The offences were essentially different in point of fact; were distinct in their nature, and in the means of their commission. It was an established rule, that an indictment could not be supported by proof of the commission of the particular offence charged, by means other than those which were alleged to have been employed. In *Hawk. P. C.* vol. 2, p. 46, s. 37, it was said, "yet it seems clear, evidence of poisoning, burning, or any kind of killing without weapon, will not sustain an indictment of death by killing with a weapon, and vice versa." That the offence here charged to have been committed, and that which was proved, were distinct, appeared as well from the reasons already suggested, as from the natural and physical difference which existed between the two modes of destruction. The demolition of a house must take place, and was alleged in the indictment to be "by force;" but in the application of fire, no force was required; an ingredient of the demolition of a house was the pulling it down; fire, however, was not an agent for such a purpose. He contended that the Court might entertain this application, for that in the Year Book, M. T., 24 Edw. 3, there was a report of a suit to reverse or review the judgment on the ground of errors, one of which was, that the offence charged against the prisoner with another person was that of conspiracy, and it was objected that the charge sounded in oppression only, and not conspiracy; and the Court so held, and reversed the judgment. This objection, he urged, did not appear to have presented itself on the record, and must have arisen

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upon the evidence: and that case, therefore, was a precedent for this application.

WIGHTMAN, J.—The defendants in this case were convicted on an indictment, which is admitted to be good upon the face of it; whatever weight there may be in the objections raised, and I am not called upon to give any opinion on them, they were raised at the trial,—they were urged before the learned Judge who presided,—and they went to the jury: but notwithstanding every thing was done, as no doubt it was, which could be done, on behalf of the prisoners, they were convicted. I think, therefore, that there is no ground for the motion. The course which is taken is altogether unprecedented: there is no instance of any proceeding such as that which is proposed to be adopted in this case. There must have been innumerable instances in which parties have been dissatisfied with their conviction on the evidence, but I know of no case, nor has any been cited, in which this Court has granted a certiorari with the object here sought to be attained.

Rule refused (*a*).

(*a*) Vide *Regina v. Howell*, 9 Car. & P. 437.

and to be sworn in a cause "Between the Reverend Thomas Bevan Gwyn, clerk, party agent, and Mary Evans, single woman, party respondent." It was urged that there was no such cause now pending in this Court as that which was described, and that upon such affidavits there could be no assignment of perjury. It was the universal practice in such cases simply to entitle the affidavits "In the Queen's Bench," for until the writ was granted, there could not be said to be any cause pending in the Court, which could be described by the names of the parties, or by any descriptive title.

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E. V. Williams, in support of the rule. The affidavits were not entitled in any cause in this Court, but in the cause in the Ecclesiastical Court. The main heading here was "In the Queen's Bench," and that which succeeded might be taken as surplusage, or as being descriptive only of the parties intended to be brought into Court, and of the nature of the proceedings which were to be taken. There were no such distinctive appellations as "party agent" and "party respondent" in this Court, and all that was written between the heading and the affidavit might be rejected. [*Wightman, J.*—In *Chitt. Arch.* p. 1210, the rule is laid down "Where there is as yet no cause in Court, the affidavits should not be entitled; otherwise the Court probably would not allow them to be made use of." Here as yet there is no cause in this Court, but you have entitled your affidavits "In Prohibition."] The practice on moving for a certiorari was, no doubt, that which was stated in the Book of Practice, but that was a distinguishable case, for there the proceedings were brought up into this Court; here, the proceedings always remained in the Court below. [*Wightman, J.*—Suppose the words "party agent" and "party respondent" were omitted, would that make any difference?] Those words were descriptive merely of the relative positions of the parties in the Court below in the suit, to which reference was made in the affi-

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davits. [*Wightman, J.*—Suppose the case of a submission to reference, and of an application being made to set aside the award, would an affidavit, entitled as between a plaintiff and defendant, be good, there being no cause in Court (a)?] It would not. [*Wightman, J.*—Is not this a case like that. Can the fact of the words “party agent” and “party respondent,” being employed instead of plaintiff and defendant, make any difference? Here, you seek to bring this matter into this Court; this rule is the first step towards that object, and your affidavits are entitled in a cause which is not in this Court, but in the Court below. You have, besides, gone further, for you have also entitled the affidavits in a cause which does not exist, for you have intitled them “In Prohibition.”] The Court would at all events allow the affidavits to be amended and re-sworn.

Bovill contended that the Court would not authorize the error of the applicant to be avoided by this means, but would discharge the present rule. It was a rule, which was strictly enforced that a party applying to the Court must come with perfect materials (b).

WIGHTMAN, J.—There is this reason why the affidavits cannot be re-sworn; namely, that they would then appear to have been sworn subsequently to the time at which

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WHITMORE shewed cause against a rule obtained by *Gray*, for setting aside the writ of ca. sa. issued against the defendant in this suit, and for discharging the defendant out of custody upon that writ. From the affidavits it appeared, that on the 30th of December, 1841, the defendant was arrested on a writ of ca. sa. at the suit of the plaintiff in this action, but that on the production of the warrant on which the arrest was made, he objected that the writ had run four months, and that its powers were therefore exhausted, and upon this objection the sheriff permitted him to go at large. The plaintiff then brought an action against the sheriff for an escape, founded upon the discharge of the defendant under the above circumstances, contending that the writ was still in full force, and notice of trial having been given, the cause stood for trial at the last Worcester Assizes. Before the day on which the cause would have come on, however, the sheriff withdrew his pleas, and the plaintiff, therefore, obtained judgment. On the 16th of July, the defendant was arrested a second time for the same debt, in respect of which he had been before arrested, but discharged out of custody, upon a writ apparently sued out by the plaintiff. The ground of the present application to the Court was, that the object of the second arrest was obviously to indemnify the sheriff, but that it was incompetent for him, after having once voluntarily permitted the escape of the defendant, to avail himself of any second writ at the suit of the plaintiff to discharge himself of his own liability, or to compensate himself for a liability to the plaintiff which had accrued against him. *Whitmore* now admitted that the object of the second arrest was that which was suggested on the part of the defendant, namely, to indemnify the sheriff; but he urged that the defendant could not, on this ground, obtain his discharge out of custody. No

Where the defendant had been arrested on a writ of ca. sa., at the suit of the plaintiff, but a voluntary escape was permitted by the sheriff, and an action was brought against the sheriff for such escape, in which the plaintiff recovered, but the defendant was subsequently again arrested on a second writ of ca. sa., nominally at the suit of the plaintiff, but which, as it was admitted, was in fact sued out, with a view to the indemnification of the sheriff, the Court ordered the writ to be set aside, and the defendant to be discharged out of custody; and costs not being prayed on his behalf, refused to impose terms on him, that he should bring no action.

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doubt the voluntary escape which the sheriff had permitted under the first writ, rendered him liable to the original judgment creditor, the plaintiff; and it must be admitted that the sheriff could not retake the defendant on the same writ, after such voluntary escape, and so relieve himself from his liability; but it must be also admitted by the defendant that it was competent for the plaintiff to retake him on a second writ, and forego his remedy against the sheriff (*a*). Then could the evidence of there having been proceedings between the judgment creditor and the sheriff alter the position of the defendant? It was submitted that it could not; for that it was not competent for the defendant to take advantage of any mistake of which the sheriff had been guilty. But, secondly, the present rule sought to have the writ set aside. That, however, was perfectly regular, for it purported to be at the suit of the plaintiff, who was clearly entitled to sue it out.

Gray, in support of the rule. This was a voluntary escape, and it was clear that after such an escape, the sheriff could not retake the defendant (*b*). Here, therefore, the retaking of the defendant must be deemed to be the act of the plaintiff, who had sued out a fresh writ. If that was so, the effect of it would be that the plaintiff would recover his debt twice over, once from the sheriff,

he could not again recover it. *Gray* was proceeding to argue the case by analogy to that of a negligent escape, when he was stopped by the Court.

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PATTESON, J.—On the facts of this case, I must take this to be a writ sued out by the sheriff in the plaintiff's name, but for his own benefit. Now, he cannot proceed so: by taking the defendant under the writ, he renders himself liable to an action, and if that is so, surely the defendant is entitled to adopt this means of procuring his discharge out of custody on motion. I take it that the plaintiff has nothing to do with this writ, though nominally it is sued out by him, and the motion must be made against him in the cause; if the writ were sued out at his instance, because he had not got his debt, no doubt the case would be different; but the sheriff obviously is not entitled to proceed as he has done.

Whitmore applied that the rule should be made absolute only on the terms that the defendant should bring no action.

Gray refused to consent to the imposition of this term on the defendant. The costs of the rule were not sought to be obtained.

PATTESON, J.—I have no power to impose any terms on the defendant, when he is entitled as a matter of right to have this rule made absolute, unless costs are asked for. Here, that is not the case. The defendant is entitled to his discharge as a matter of right. I think the plaintiff is not altogether free from blame, for, knowing that these proceedings were taken in his name, he should have applied to prevent them from being continued. It would be extremely dangerous to come to any other decision than that at which the Court has arrived; for, otherwise,

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whenever a voluntary escape was permitted, it would become a matter of course to sue out a fresh writ to indemnify the sheriff.

Rule absolute.

REGINA v. DOUGLAS.

In an information at the suit of the Crown, the Court will grant a rule for a mandamus to examine witnesses in India, upon the statement of her Majesty's Attorney General, that the writ is necessary, and will not require the production of any affidavit in support of that statement.

THE ATTORNEY GENERAL (with whom were *Pollock* and *Forsyth*,) moved for a mandamus to be directed to certain official persons at Madras, commanding them to proceed to the examination of several individuals, who were named, as witnesses upon this information. The prosecution was instituted by the Crown under the 33 Geo. 3, c. 52, s. 62; no affidavits were produced in support of this motion, but as the information disclosed the fact that the alleged offence arose in the presidency of Madras, the rule would be drawn up on reading that information. [*Wightman*, J.—For anything that appears the witnesses may be in this country; it is not the usual practice to grant a rule for a mandamus without some affidavit of the necessity for it]. It was sufficient for her Majesty's Attorney General to state the facts to the Court, and upon his certifying the necessity for the rule, it would be granted as of course. Such was the practice with reference to an application for a trial at

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REGINA v. GORDON, and Others.

W. H. WATSON moved for a rule, calling upon the prosecutor of this indictment to shew cause why he should not furnish to the defendants the names and additions of the witnesses mentioned on the back of the bill of indictment. It was an indictment for a conspiracy, which had been removed into this Court by certiorari, from the Central Criminal Court, where it had been preferred and found. In Trinity Term last, an ineffectual attempt had been made by the prosecutor to carry back the indictment by procedendo, but the case now stood for trial at the sittings after the present Term. Upon the occasion of the application for the procedendo, an affidavit of one Scherwinski, a Pole, was produced, which went to shew that one Alexander, a person of notoriously bad character, had made efforts to suborn the deponent to give evidence against the defendant, and to swear to facts and occurrences of which he had no cognizance whatever. The defendant Gordon now swore that he had seen the names of the persons who appeared as witnesses on the back of the bill of indictment, but that he had not the least knowledge of them; that he had not heard of many of them, and that he believed that they had been procured as witnesses for the purpose of securing the bill to be returned a true bill, and had been paid for so doing; that he had caused inquiries to be made respecting them in order to ascertain their respective occupations and abodes, but that the only information which he had been able to obtain was, that they had been procured by Alexander to give evidence; and that he had been informed and verily believed that many persons had been bribed and tampered with by the said Alexander. It was urged that the present application was one of a very reasonable description, and that it was just that the defendants should have sufficient means presented to them to make full investigation into the characters of the persons

The Court refused to grant a rule, calling upon the prosecutor of an indictment for a conspiracy, to furnish to a defendant, the names and additions of the witnesses on the back of the bill of indictment, even though it was sworn by him that he was totally unacquainted with those persons, and that he had reason to believe that they had been improperly procured and suborned for the purpose of the prosecution.

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whose testimony was to be produced against them. The only mischievous result which it could be suggested would proceed from the application being granted was this, that the defendants would be enabled to tamper with the witnesses. It was rarely the case, however, that a defendant was altogether unacquainted with the persons whose evidence was to be adduced against him, and this argument would, therefore, have no weight.

PATTERSON, J.—I do not think I am authorized to go the length which I am asked to go, upon principles which are important for the advancement of the cause of justice. I never heard of such an application before, and I doubt whether any such has been ever made; and yet circumstances of this kind must have occurred, in which it would have been most useful for defendants to have such information as is asked. I do not think that I possess the power to grant this application, and in the absence of all authority, I cannot establish such a precedent.

Rule refused.

RAYNER v. WRIGHT.



to wit on the 19th of June, 1841, and on other days between that day and the commencement of this suit, within the city of London, and not elsewhere, by the plaintiff as a broker, and as the broker of the defendant, &c., and the plaintiff was not before, or at any of the times when the said work was so done, admitted to act as a broker by the Court of Mayor and Aldermen, for the time being, of the said city, in pursuance of the statute, &c.

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Demurrer, for that although the cause of action in the first count of the declaration is a debt of 45*l.*, therein alleged to be due from the defendant to the plaintiff for work done, &c., and the causes of action in the last count of the declaration is a debt of 45*l.* for money due upon an account stated, yet the defendant by his plea hath alleged that the monies in the first and last counts are claimed for, and in respect of work done, &c., which allegation is wholly inconsistent with, and contradictory to, the cause of action claimed in the last count of the said declaration; and also, for that the plea neither directly traverses nor confesses, and avoids the cause of action in the last count, but amounts only to an argumentative and circuitous traverse of the existence of that cause of action; and also, for that the defendant hath not in or by his said plea offered to take or taken a proper issue upon the said first and last counts of the said declaration, but hath pleaded and shewn other matters, and hath improperly attempted to confine and limit the plaintiff to one cause of action instead of two separate and distinct causes of action.

H. S. Cooper, in support of the demurrer. The plaintiff by the first and last counts of his declaration, had demanded two separate and distinct sums of 45*l.* each; and the plea professing to answer both counts, in fact, furnished an answer to one only. It did not allege that the account stated, which formed the subject of the last count, was stated in respect of the monies due and owing on the first count, but it averred merely that the two sums were

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claimed for work, apparently intending to aver the work to be the same. The defendant, however, if he meant to set up for a defence to the two counts, the identity of the respective causes of action claimed in each, should have averred the identity of the sums demanded, and not of the work. The two sums claimed in different counts could not be said to be for the same cause of action, unless it was expressly averred that they were one and the same debt, and not other and different debts; and it was submitted that it was incumbent on the defendant so to have pleaded, for that this was a material averment, the omission of which could not be supplied by intendment. The mode in which the defence, of which the defendant sought to avail himself, should have been pleaded was this; the plea should have averred that the account stated in the last count was stated in respect of the same monies as were alleged to be due in the first count, and that those monies formed one identical debt of 45*l.*, and not other and different debts of 45*l.* each, and then he might have further averred that the sum of 45*l.* so claimed was sought to be recovered for work done, &c. The cases of *Mee v. Tomlinson* (a), and *Shelden v. Clipsham* (b), shewed that such was the proper form of allegation; and *Taylor v. Herbert* (c) shewed also that this plea was bad. A traverse of the allegation in the plea would not raise a proper issue, because the issue which the

of the two sums of money was unnecessary, and the defendant had not sought to set up such an allegation. What he in effect said, was, that the two sums were claimed for the same work, and by that allegation he in substance traversed the count on the account stated. [*Wightman*, J.—The plaintiff does not claim the money due on the account stated as being for work at all]. The cases of *Mitchell v. Townley* (a), *Wright v. Acres* (b), and *Noel v. Davis* (c), were referred to.

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Cooper, in reply, was stopped by the Court.

LORD DENMAN, C. J.—The plea is clearly bad. It affords an answer to the first count only, which is for work done; and it offers no answer whatever to the count on the account stated; that, however, is a distinct count, apparently giving a distinct cause of action, and, therefore, requiring a distinct answer. The plaintiff is entitled to judgment.

The rest of the Court concurred.

Erle asked for leave to amend, on payment of costs, which, however, was refused.

Judgment for the Plaintiff.

(a) 7 Ad. & El. 164.

(c) 4 M. & W. 136.

(b) 6 Ad. & El. 726.

PINCKNEY v. BOOTH.

THIS was a rule calling upon the defendant to shew cause why the writ of trial in this action should not be

A cause was
 tried before an
 under-sheriff,
 and the trial

having commenced late on the return day of the writ of trial, the jury did not deliver their verdict, until after one o'clock in the morning of the next day; the sheriff indorsed on the writ that the trial had taken place on the day it commenced; the plaintiff having brought a writ of error, the Court refused to direct the sheriff to indorse the facts as they occurred, upon the writ of trial.

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sent back to the late sheriff of Yorkshire, in order that the day and hour when the verdict of the jury was returned, might be indorsed thereon. From the affidavits, it appeared that the writ of trial was returnable on the 27th of July, 1841, and that upon the afternoon of that day at five o'clock, this cause was called on for trial. The jury retired to consider their verdict, and at a quarter past one o'clock on the morning of the 28th of July, they returned into Court and found for the defendant. The indorsement on the writ of trial was, that the cause had been tried on the 27th of July. The plaintiff had brought a writ of error, and the object of the present motion was that the date of the finding of the jury might be stated according to the fact. *Mortimer v. Preedy (a)*, was cited on the motion for the rule.

Martin now shewed cause. He contended first, that the motion was too late, for that in M. T. 1841, the plaintiff had applied for a new trial, and had been unsuccessful, and further, that the defendant had joined in error, and the cause stood for argument in the Exchequer Chamber at the sittings after the present Term; secondly, that the facts which were sought to be stated on the record, formed no objection, and that the trial having been commenced on the day of the return, the circumstance of the verdict not

the plaintiff was to procure the opinion of a Court of Error on the sufficiency of the trial.

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WIGHTMAN, J.—I do not feel that I have any authority to direct the sheriff to state this fact on his return. If he has made a false return, the plaintiff will be entitled to the benefit of any error which may appear upon it.

Rule discharged with costs.

Ex parte NICHOLLS.

ELLIS moved for a rule, calling upon an attorney of this Court, to shew cause why he should not deliver up certain papers and instruments in his possession, the property of the applicant. From the affidavits, it appeared, that the attorney in question, had assumed the character of attorney to the applicant, although he was not authorized to do so; the papers in question had come into his hands as executor to his late father, who had been the attorney of the applicant, but with whom he had not been connected as partner. He had tendered his services to act as professional adviser to the applicant, but on their being declined, he stated his intention to retain the papers with other views.

The Court refused to grant a rule, calling upon an attorney to deliver up papers, when it appeared that the documents had come into his possession as executor to his father, who had been attorney to the applicant, but where the applicant did not adopt the son as his professional agent.

WIGHTMAN, J.—This gentleman is a stranger to you: you repudiate his being your attorney, and I do not see how you can call upon him to account to you as such.

Rule refused.

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LUCAS and Others, Assignees v. EADES.

In an action by the assignees of a bankrupt's estate, for a debt due to the estate, the bankrupt was called to negative a plea of payment to himself, of the debt in the declaration mentioned before his bankruptcy: *Held*, that he was a competent witness, and that he might prove by parol that he had released the surplus of his estate, without producing, or otherwise proving any deed of release.

MACAULEY shewed cause against a rule obtained by *Hoggins*, for a new trial. It was an action brought by the assignees of one Thomas Jones, a bankrupt, to recover a sum of money alleged to be due to the bankrupt's estate: the defendant pleaded a plea, alleging that the bankrupt, before his bankruptcy, had accepted goods in satisfaction of the debt. At the trial, before the under-sheriff of the county of Worcester, the plaintiff having made out a *prima facie* case, the defendant produced evidence in support of his plea: the plaintiff then called the bankrupt to negative the allegations made on behalf of the defendant, and he was sworn in the cause. He was then asked, whether he was not the bankrupt, and he answered that he was; secondly, he was asked whether he had released the surplus of his estate; but this question was objected to, on the ground that the release ought to be produced, and the under-sheriff rejected the witness. A verdict was in consequence found for the defendant. *Macauley* now urged, that the bankrupt was not a competent witness to increase his estate, unless a regular release was produced in evidence. *Carlisle v. Eady* (a). This case was moved on the authority of *Lunmiss v. Row* (b). There, in an action against

timony of the bankrupt himself, which was as good for this purpose as that of any other witness would have been. His incompetency, therefore, was established, and the evidence of that incompetency must be rebutted by other testimony such as in an ordinary case would be good and sufficient. *Goodhay v. Hendry (a)*, was also referred to.

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 {
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Hoggins, in support of the rule, was stopped.

WIGHTMAN, J.—I cannot distinguish this case from *Lunniss v. Row*. The rule must be made absolute.

Rule absolute accordingly.

(a) Moo. & Mal. 319.

EDWARDS v. PENHEY.

WARREN moved for leave to sign judgment on an old warrant of attorney. He was furnished with all the necessary documents to support the application, except an affidavit by the attesting witness. The reason of the omission was, that the witness had been transported seven years previously, and no information had been obtained with respect to him since that time. There was, however, an affidavit, verifying his handwriting, as well as that of the defendant. It was, therefore, submitted, that under these circumstances, the rule might be granted.

Where the attesting witness to a warrant of attorney, had been transported seven years previous to an application to sign judgment, and no information respecting him could be obtained, the Court allowed judgment to be signed, on producing an affidavit of his handwriting, as well as that of the defendant.

PATTESON, J.—I think that is sufficient. You may take your rule.

Rule granted.

COURT OF EXCHEQUER.

Michaelmas Term.

IN THE FIFTH YEAR OF THE REIGN OF VICTORIA.

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Doe dem. ALLIS v. OWENS.

A person may be admitted to sue in forma pauperis, at any time during the progress of a suit, but in such case, if the defendant succeed in the action, the plaintiff must pay the defendant's costs up to the time of the plaintiff's admission so

THIS action of ejectment was commenced in Michaelmas Term, 1839, and on the 23rd of January, 1840, the defendant entered into the usual consent rule. On the 22nd of February, a bill of particulars was delivered, and issue was joined on the 4th of March, 1840. On the 12th of November in the same year, a rule nisi for judgment as in case of a nonsuit, was discharged on a peremptory undertaking to try the cause at the then next assizes for the county of Carnarvon. Notice of trial was given on the 6th of March, 1841, and on the same day, an order was made by *Alderson, B.*, admitting the lessor of the plaintiff to sue in

The lessor of the plaintiff then taxed his costs of opposition, which were allowed at 10*l.* 1*s.*, and the defendant tendered his bill of costs, amounting to 25*l.* 10*s.* 10*d.*, to the Master, who, being of opinion that the order to prosecute the action in formâ pauperis, did not exempt the lessor of the plaintiff from the payment of costs incurred prior to the date of the order, allowed the defendant the sum of 17*l.* 3*s.* 6*d.* for such costs, and 1*l.* 12*s.* 8*d.* for the costs of taxation.

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Townsend had obtained a rule, calling on the defendant to shew cause why the Master's allocatur should not be set aside, and why the defendant should not pay the costs of the application.

Jervis shewed cause. The lessor of the plaintiff is liable to pay the costs incurred prior to the time of his admission to sue in formâ pauperis. The 11 Hen. 7, c. 12, which conferred the right to sue in formâ pauperis, enacts, "that every poor person or persons which have, or thereafter shall have cause of action or actions against any person or persons within this realm shall have, by discretion of the Chancellor of this realm for the time being, writ or writs original, and writs of subpœna according to the nature of their causes, therefore nothing paying." At the time of that enactment, a plaintiff paid no costs to a defendant who succeeded. Then came the 23 Hen. 8, c. 15, the first section of which gave costs to defendants in case they obtained a verdict, or the plaintiff was nonsuited, and the second section enacts, "that all and every such poor person or persons, being plaintiff or plaintiffs in any of the said actions, bills or complaints, which, at the commencement of their suits or actions, shall be admitted by the discretion of the Judge or Judges where such suits or actions shall be pursued or taken to have their process of charity without money or fee paying for the same, shall not be compelled to pay any costs by virtue and force of this statute." That

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section operates by way of proviso, exempting persons admitted to sue in formâ pauperis, from the payment of costs under the first section. By an equitable construction of the statute, it has been held, after some doubt, that a party may be admitted to sue in formâ pauperis after the commencement of the suit, but in that case, he will be liable to pay costs up to the time of his admission so to sue. *Foss v. Racine* (a), *Lovewell v. Curtis* (b), *Casey v. Tomlin* (c), *Brunt v. Wardell* (d). It must be admitted that there are some old cases to the effect that a pauper is relieved from the payment of all costs, but in *Com. Dig.* tit. "*Formâ pauperis*," (A.), a rule of this Court in the year 1719, is cited, that "no pauper is to be admitted but by consent of the clerk and counsel assigned to be standing counsel, and if admitted after the commencement of the suit, the pauper to give security to pay the costs before admittance." That rule shews that a pauper was not altogether exempt from the payment of costs, otherwise the Court would have had no power to make the rule. In *Langley v. Blackesly* (e), this point did not arise. In *Blood v. Lee* (f), the question was adjourned, and it does not appear from the report that the Court came to any decision. In all those cases, the principal point before the Court was, as to the time of admitting a plaintiff to sue in formâ pauperis and the dicta as to costs were extra-ju-

which does not affect costs incurred previously, and up to the date of that order, and for payment whereof by the plaintiff to the defendants, a distinct order was made by the Court."

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Townsend, in support of the rule. So long as the order allowing the lessor of the plaintiff to sue in formâ pauperis, remains in form, he is exempt from the payment of costs. The rule of this Court, which has been referred to, shews, that when a person is admitted to sue in formâ pauperis, after the commencement of the suit, the proper course is, to call upon him to give security for the costs incurred prior to his admission. The true construction of the statute of Hen. 7, is to be found in the judgment of *Tindal*, C. J., in *Brunt v. Wardell*, his Lordship there says, "Looking at the act of the 11 Hen. 7, it is obvious that it is an enabling statute which was meant to confer a boon on the poor. The title of the act strengthens this proposition, for it describes the statute as "a means to help and speed poor persons in their suits;" therefore, unless there is something conditional in the act requiring either by express words, or by necessary implication, that a party must apply for leave to sue in formâ pauperis, before or at the commencement of the suit, there is no reason why we should impose such a condition: for why should a person be the less entitled to consideration, because he becomes a pauper during the progress of a cause, and not before its commencement:" And *Maule*, J., alluding to *Foss v. Racine*, and *Lovewell v. Curtis*, says, "It is to be observed, that the attention of the Court of Exchequer was not called to the undoubted common law authority of the Courts, to admit parties to sue in formâ pauperis. The statute of Hen. 7, was never intended to apply to criminal proceedings, yet the Court of King's Bench has admitted parties to sue in such cases, in formâ pauperis, and this must have been by the common law power of the Court." The words "at the commencement of the suit" in the stat. of Hen. 8, do not mean before or

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simultaneously with it; the admission must in all cases, be after the commencement of the suit, for until a writ has issued, the Judge has no authority to interfere. The form of a petition for an order to sue in formâ pauperis, shews this, it states, "that the defendant is justly indebted unto your petitioner for goods sold, &c., and your petitioner hath commenced an action against him for the same" (a). The second section of the stat. of Hen. 8, must be read as if incorporated with the stat. of Hen. 7. The decisions on the statutes relating to costs are analagous. The words "immediately afterwards" in the 3 & 4 Vict. c. 24, s. 2, have been construed to mean within a reasonable time afterwards. The 8 & 9 Wm. 3, c. 11, s. 14, gives a plaintiff full costs, though the verdict is under 40s., if the Judge, at the trial of the cause shall certify that the trespass was wilful and malicious; but it has been held that such certificate may be granted out of Court, at any time between verdict and final judgment. A similar construction has been put upon the 22 & 23 Car. 2, c. 9. The 2 Geo. 2, c. 28, s. 8, enables certain persons prosecuted by capias, to sue in formâ pauperis, and directs the Judges, "according to their discretion, to admit such person to defend himself against such action or information, in the same manner, and with the same privilege as the Judges of such Court are by law directed and authorized to admit poor subjects

suit, that is, as soon as the Judge could admit him]. He then referred to *Brittain v. Greenville* (a), *Oats v. Holiday* (b), *Blood v. Lee* (c), *Jones v. Peers* (d), *Gibson v. M^cCarty* (e), *Sloman v. Aynel* (f), *Morgan v. Eastwick* (g), *Corbett v. Corbett* (h), *Beames on Costs*, 112.

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LORD ABINGER, C. B.—The question is, whether a person admitted to sue in formâ pauperis, after the commencement of the suit, indeed after the trial has taken place, is to be protected from paying to the defendant costs incurred, antecedent to his admission so to sue? If the cases had laid down any precise rule upon the subject, I for one, should have said, that it is now too late to overrule them by putting a new construction on the statute; but where the cases are either of no sufficient authority, or are not uniform, we are at liberty to put the best construction we can upon these acts. If you look at the stat. of Hen. 8, there can be no doubt the intention was to give a successful defendant costs against the plaintiff, but then the act makes an exception in favour of paupers admitted at the commencement of the suit. There is a good reason for that distinction, because, as is now conceded, a person might be admitted to sue in formâ pauperis, at any time before, or even after trial, and would, in such cases, have the full benefit of the stat. of Hen. 7, as to Court fees and fees to counsel. But it becomes a question whether, if the Legislature intended to exempt the pauper from paying the defendant's costs in all cases, they would have used the words "at the commencement of the suit," I cannot interpret those words in any other way than according to their ordinary meaning, nor can I see how the word "at" can be construed "after." A person admitted before the commencement of the suit may, in one sense, be said to be admitted at the commence-

(a) 2 Stra. 1121.

(b) Cited in 3 Wils. 24.

(c) 3 Wils. 24.

(d) M^cClel. & Y. 282.

(e) Cas. temp. Hard. 311.

(f) Fortes. 320.

(g) *Ante*, vol. 7, p. 543, O. S.

(h) 16 Ves. 407.

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ment of the suit ; but it is difficult to see how a person admitted after the commencement of the suit, can be said to be admitted at its commencement. The ingenious interpretation put upon these statutes by the plaintiff's counsel, rests upon a mere fallacy. The word "at" in the statutes relating to costs which have been referred to, is only used to identify the character of the person who is to certify, that is, he must be the Judge who presides at the trial. But here, the words "at the commencement of the suit," have reference to time, and can only mean, being admitted before or at the commencement of the suit. The statutes do not apply where a party is not admitted at the commencement of the suit. By an equitable interpretation of the statutes of Hen. 7, when a party is once admitted, he is not liable to costs, under the stat. of Hen. 8, but he is not exempt from the payment of the costs incurred, previous to his admission.

PARKE, B.—I am of the same opinion. The question turns upon the proper interpretation to be put upon the second section of the 23 Hen. 8, c. 15. The action of ejectment, though not provided for by that statute, being placed on the same footing as other actions by the 4 Jac. 1, c. 3. We are called upon to put a construction upon the stat. of Hen. 8, and the question is, whether or no the second

doubtedly the principal point decided, but it is said that "the Court resolved that a person so admitted, should not pay costs from the beginning." What is the true meaning of that resolution is left in doubt. The construction which we put upon the statute is, that if a pauper be admitted, after the commencement of the suit, he shall not be bound to pay all the costs, but that he is bound to pay some costs, and is exempt merely from those subsequent to his admission. There is now no doubt that a party may be admitted to sue in formâ pauperis after the commencement of the suit, and so far as our proceedings are concerned, it is clear, from the current of authorities, that we were correct in so deciding; but the question is, the effect of such an admission as respects the payment of costs? By the second section of the statute of Hen. 8, a pauper is exempt from costs only in the event of his being admitted at the commencement of the suit; that is, as soon as the Court or a Judge had jurisdiction to admit him. The effect of the statute is a total exemption only in case of admission at the commencement of the suit, but if admitted after, by an equitable construction of the act, he shall only be liable to the costs incurred up to the time of his admission. In this case we must, therefore, hold that the lessor of the plaintiff is not altogether exempt from costs, but is liable to pay the costs incurred by the defendant up to the time of his admission to sue in formâ pauperis, and it is reasonable that he should pay the costs of taxation.

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GURNEY, B.—I think such is the true construction of the act of Parliament.

ROLFE, B.—Looking at the language of the second section of the statute of Hen. 8, the first observation which occurs is, that if you follow the words of that act, it does not exempt this lessor of the plaintiff from the payment of any costs; because, in terms, it only exempts persons admitted to sue in formâ pauperis, at the commencement of

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the suit. But then it is said, that the Court should adopt an equitable construction, and that by such construction, a pauper would be wholly exempt; I agree that it is right to adopt an equitable construction, that is, such a construction as shall really do equity, not such as shall favour one side at the expense of the other. The statute says, that a pauper shall be exempt from the payment of costs, if admitted at the commencement of the suit, but we are asked to leave out the words "at the commencement of the suit," and to say that he is exempt whenever admitted. The meaning of the act is, that if the pauper is admitted after the commencement of the suit, then from that time he shall pay no costs.

Rule discharged (a).

(a) See *Pitcher v. Roberts*, ante, p. 394, accord.

HIBBERT v. BARTON.

A cognovit was attested as follows :—
" Witnessed by me, W. P., as the attorney of the said W. B., attending at the execution hereof, at his request,

KELLY had obtained a rule, calling on the plaintiff to shew cause why a cognovit given by the defendant, and the judgment and execution thereon, should not be set aside, on the ground that it was not attested in the manner prescribed by the 1 & 2 Vict. c. 110, s. 9. The attestation was as follows:—" Witnessed by me, William Pemberton, as the attorney of the said William Barton, attending at the exe-

hardly be contended that any precise form must be used; the question, therefore is, whether, when the attorney, in this case, uses the words "as the attorney," he does not comply with the two latter requisites of the statute, and declare both that he is the attorney for the party executing, and that in that character he attests the cognovit? Suppose the words had been "I, by this attestation, declare myself to be the attorney for the said W. B.," that would have been sufficient. There is, in effect, no difference between the form, "I, the attorney, and I, as the attorney." Though the statute uses the word "declare," it need not necessarily be used in the attestation. An allegation, that a person acted as attorney for another, would be in pleading, a sufficient statement that he was attorney of the latter. A declaration against the drawer of a bill of exchange, states, that he made his bill, and thereby "required" the drawee to pay, &c., when the bill is produced the word "require" is not upon it, but such statement is supported, by the language of the instrument. In like manner, an averment in a declaration, that A. B. sues as executor of C. D., is a sufficient statement of A. B.'s representative character. *Elkington v. Holland* is distinguishable, for there, the allegation, "I subscribe myself as attorney for the said J. A., expressly named by him, to attest," &c., is consistent with his not being the attorney of J. A., as the authority to act as such, may have been revoked before the execution of the instrument. Besides, in that case, the attestation did not contain the words "attending at the execution hereof at his request."

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Kelly, in support of the rule. The Court cannot hold this attestation sufficient without overturning the principle upon which all the cases on this section of the statute have been decided. That principle is, that there must be not only a substantial, but a literal compliance with the terms of the statute. [*Parke, B.*—The statute does not require any express form of words, therefore, there cannot be a

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literal compliance with it.] It requires that the attorney present shall subscribe, &c., and thereby declare himself to be attorney, &c., and state, "that he subscribes as such." Both those requisites must be complied with, and it is not sufficient to say, that the one is included in the other. [*Parke, B.*—The word "thereby" does not refer to the attestation, but means by the act of subscribing.] It is said, that the latter declaration is included in the former, but if that were so, it would have been useless to introduce it. A person may attest an instrument as attorney without being an attorney.

Lord ABINGER, C. B.—I think the attestation insufficient. This rule must therefore be absolute, the plaintiff restoring the money levied, and the defendant undertaking to bring no action. If we look at the spirit of modern legislation, we shall find that the feeling of the times, whether wisely or not, it is unnecessary to say, is in favour of defendants and prisoners; and the section of the act of Parliament under consideration was no doubt framed with the view of extending the provisions which previously existed in their favour. Bearing in mind these circumstances, we must look to the act of Parliament, and give it the best construction we can. I do not mean to say, that this attestation is not *prima facie* evidence of Pemberton being the attorney

not at liberty to say that a compliance with one is sufficient, I think the safest course is to construe the act literally, and as the Legislature has required it, to enforce the double provision. Moreover, it is possible that a case might occur, in which it would be perfectly competent for an attorney to subscribe a cognovit as attorney for the party executing it, whereas, in fact, he was not the attorney in this particular transaction, and is unacquainted with the nature of the instrument. The witness might be the attorney of the party in other matters, and might, therefore, truly state himself to be attorney, yet that would not be a compliance with the statute, which requires a declaration that he is the attorney in the particular transaction. The attestation should state that the party attesting is the attorney, and that he subscribes as the attorney of the party executing the cognovit. This rule must, therefore, be made absolute on the terms which I have already mentioned.

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PARKE, B.—I am of the same opinion, and although I have, and still do, entertain some doubt on this question, I think the better course will be to construe the words of the act of Parliament according to their ordinary and grammatical meaning. It appears to me, that the Legislature requires three things, viz., that the attorney shall subscribe his name to the due execution of the instrument, and shall “thereby,” that is, by the memorandum of attestation, declare himself to be the attorney of the party executing, and also that he subscribes his name as such attorney; I agree that no precise form of words is necessary, but such words must be used as to enable the Court to collect therefrom that the attesting attorney was present, for the purpose of advising as to the nature and effect of the instrument, and also that he witnesses the execution as attorney for the party. We ought not to presume that the Legislature would make use of a redundant expression, and as it cannot be collected with certainty from the words used in this attestation that the subscribing witness was the attorney

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for the party executing the cognovit throughout the transaction, I think that we are bound to hold that it is insufficient.

GURNEY and ROLFE, B.'s, concurred.

Rule absolute.

CHEESE v. SCALES.

A motion to set aside proceedings, on the ground of a mis-trial, must be made within the first four days of the next term.

A venire facias, bore teste 4th of June, 1842, and was returnable immediately. The distringas juratores, bore teste 2nd of November, 1842, and commanded the sheriff to

THIS was an action for libel, and was tried before Lord Abinger, C. B., on the 25th of June last, when a verdict was found for the plaintiff. Upon the taxation of costs, (on the 12th of November following,) it was discovered that the entry of the jurata on the nisi prius record respited the jury until the 17th of June, unless the Chief Baron should first come, on the 15th of June, at the Guildhall of the city of London. The venire facias was tested on the 4th of June, and commanded the sheriff to come before the Barons forthwith, on the 6th of June, with twelve men, to make a jury between the plaintiff and defendant. The writ of distringas juratores was tested on the 2nd of November, and commanded the sheriff to distrain the jurymen, so that he might have their bodies on the 17th of June.

coram non judice, and, therefore, not within the general rule. *Crowder v. Rooke* (a) is in point: "there the cause was at issue, and the record of nisi prius, habeas corpora, and jurata, were all made up for trial at a certain sittings, but the cause not coming on to be tried at that day, the plaintiff's attorney ought to have altered the record of nisi prius, writ, and jurata, for a future day of the sitting, but neglected to do so, or to reseal the same, although he was apprised thereof; so the cause was tried upon a future day, and it appeared, upon the face of the jurata, &c., that the cause was tried after the day of nisi prius mentioned therein, and there was a verdict for the plaintiff: the plaintiff moved to amend the habeas corpora and the jurata, and the defendant moved to set aside the verdict. A rule was made to shew cause why the amendment should not be made, and, upon shewing cause, the whole Court were clearly of opinion that the trial was coram non judice, and discharged the rule for an amendment, but were of opinion, that they ought, ex officio, to order a venire de novo to be awarded."

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LORD ABINGER, C. B.—You should have moved within the first four days of Term.

PARKE, B.—In a case of *Gee v. Swan* (b) we refused a similar application. You can have a writ of error.

Rule refused.

On a subsequent day, a writ of error, coram vobis, was sued out and allowed, after which,

Barstow obtained a rule nisi to amend the nisi prius record and writ of distringas juratores.

(a) 2 Wils. 144.

(b) *Ante*, vol. 1, p. 896, N. S.

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Crowder and Hurlstone shewed cause. The Court have no power to make the amendment prayed for. This is not the case of a misprision of the clerk, but of a substantial defect in the jury process. The writ of *distringas juratores* correctly follows the award of the jurata and the writ of *venire*, and the objection arises from the act of the Court, in having awarded a *distringas* returnable out of Term, and before the cause was in fact tried. There must be an award on the roll to warrant the issuing of the *venire* or *distringas*, *Bac. Abr.* tit. "*Juries*," 525, *Besey v. Hungerford* (a). The entry of the jurata is the award of the *distringas*, *Vin. Abr.* tit. "*Amendment*," (B a.) p. 5, *Gill. C. P.* 176. It is true that, by the practice of modern times, the first entry is made on the *nisi prius* record, but the proceedings must be considered, in contemplation of law, as entered *pari passu* on the roll, and that the *nisi prius* record is a correct transcript of the roll. Process which has not the roll to warrant the amendment, cannot be amended, *Com. Dig.* tit. "*Amendment*," (C 1.) In *Vin. Abr.* tit. "*Amendment*," (B a.) pl. 6, it is said, "If *distringas juratores* be returned 15 Pasch., and the roll is *Tres Septimanas Pasch.*, and the jury at 15 Pasch., this is error, and shall not be amended, for this is not misprision of the clerk, but misprision of the justices, who ought to have regarded the roll, and not the writ, for this is the record for the

jurata are right, and the amendment does not alter the point in issue, the nisi prius roll may be amended by the plea roll; but here neither distringas nor jurata are right. The day appointed for the nisi prius is impossible, and the Judge's authority is confined to the day. He has no authority to try nisi Johannes Holt, &c., 27 Junii prius venerit, which cannot be. Where a Judge's authority is confined to a day, his trial at another day must be without authority. A venire facias, returnable at a day before the teste has been held not to be amendable, 1 *Roll*. 200, *Com. Dig.* tit. "*Amendment*," (V 1.) In *Gilbert's Common Pleas* (a), it is said, "the award of venire must be to a day in Term, otherwise it is erroneous, because this is not such a discontinuance as is ordered by the statute, since it is an error in the Court by awarding the process which makes it utterly uncertain when and where the parties should appear to receive judgment, and it is an act of the Court which is erroneous, and not a mis-entry of the clerk, which the statutes do not intend to aid." Though, in the present case, the defect is in the jurata and distringas, yet the authorities respecting the venire are applicable, since, in modern times, the trial takes place upon the distringas and the venire is sued out for form (b). This amendment cannot be made under the statute of jeofails, which does not help the erroneous award of the Court, *Kingsale v. Compton* (c), nor does it fall within any of the cases of amendment enumerated in *Blackamore's case* (d), for, in order to amend under the statute of amendment, there must be something to amend by. *Crowder v. Rooke* and *Rogers v. Smith* were also referred to (e).

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Barstow, in support of the rule. This is a mere misprision of the clerk, who has inserted the 2nd of November as the teste, instead of the return day of the writ. Two

(a) p. 174, *Grey v. Willoughby*,
 Moore, 465.

(b) See 1 Arch. Prac.

(c) 11 Mod. 86.

(d) 8 Rep. 156.

(e) 1 Adol. & E. 772.

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cases of *Waldo v. Harrison*, in *Barnes' Notes*, are authorities for the amendment (a). The venire is the principal jury process, and all defects in the distringas may be amended thereby, *Bullock v. Parsons* (b). The circumstance of a writ of error having been sued out, does not prevent the Court from allowing the amendment, *Dunbar v. Hitchcock* (c).

Cur. adv. vult.

LORD ABINGER, C. B.—In the case of *Cheese v. Scales*, we are of opinion that the rule for the amendment ought to be made absolute. My brother *Parke* has looked into the authorities, and is prepared to state the reasons.

PARKE, B., (after stating the facts). The question is, whether, according to the authorities, the amendment can be made? That depends on the Statutes of Amendments, and not on the Statutes of Jeofails. By those statutes, particularly the 8 Hen. 6, c. 12, the Courts are empowered to examine and amend in affirmance of the judgment what they shall think in their discretion to be the misprisions of their clerks “in any records, processes, &c., writ, panel or return, &c.” and these amendments may be made before or

(a) *Barnes*, p. 5. These cases amend the jurata in the record as follows:—

of nisi prius. The Court after

after error brought; but in order to amend on these statutes, there must be something to amend by. Now, in the present case, the venire facias is correct. It is made returnable immediately, as by the stat. 3 & 4 Wm. 4, c. 67, s. 2, it may be. The writ of distringas juratores is incorrect. It commands the sheriff to have the bodies of the jurors in vacation, instead of the first day of the following Term, and it is tested on the day on which it ought to have been returned; both these are evidently misprisions of the clerk, who is considered, in point of law, as having prepared and issued the writ; and the award of the jurata, which is to be considered as being on the roll, or may be put there, is a sufficient warrant to amend the writ of distringas by, so as to make the teste of the writ of distringas on the day it is now returned, and the return on the first day in the subsequent Term. In substance, the writ is right, and there is no mis-trial, for the jury are to appear at Guildhall, if the Chief Baron should come there on the 15th of June; he did come on that day; they appeared there, and they were, therefore, properly summoned to try the cause; and the other branch of the alternative, that of their being brought to Westminster on another day, became nugatory. The cause was, in fact, tried at an adjournment of the sittings, which began on the 15th, and after the day when, in the event of their not having appeared at Guildhall, they would have had to appear at Westminster. That is immaterial, and this amendment may be made consistently with the authorities. In *Gilbert's History and Practice of the Common Pleas*, (page 177), it is said, if the distringas is omitted, or wrong in any of the particulars before mentioned, including teste and return, it may be amended by the venire, for it is a secondary process to bring in the jury. In the case of *Bullock v. Parsons* (a), a bad distringas appears to have been amended by the venire. So

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(a) 2 Ld. Raym. 1143.

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in *Roll's Reports*, p. 111, a similar amendment was made. In *Waldo v. Harrison*, the distringas was amended as to the return, and in the second report of that case it seems to have been a mistake to attribute that amendment to the Statute of Jeofails, it must have been amended under the Statute of Amendments. The cases relied upon to the contrary are distinguishable. In the case of *Crowder v. Rooke*, the cause was tried at a subsequent sitting to that at which the jury were to appear by the distringas, so that the jury were not properly summoned, and the proceeding was coram non judice. Here, the cause was tried at the same Sittings before a jury properly summoned. On the same ground, the distringas was not amended in *Child v. Harvey*. The day appointed for the nisi prius was after the return in banc, and was an impossible day, and the Judge was held to have had no authority to try the cause before a jury so summoned. The other case of *Rogers v. Smith*, was not a question on the Statute of Amendments, but on the Statute of Jeofails. Whether this distringas would be amended on error, is not now to be decided, it is enough to say, that we think the amendment ought to be allowed on motion. The rule must, therefore, be absolute, on payment of costs of the application and writ of error.

Rule absolute accordingly.

entered into possession under it (a). The plaintiff also proved a notice to the defendant to produce a deed of the assignment of the messuage by W. Hitchcock to the defendant. The defendant having omitted to produce the assignment, the plaintiff called a witness, who produced a document, which he said was a true copy of the original assignment, which he had seen. It was objected, that the copy was inadmissible for want of a stamp. The learned Judge overruled the objection, reserving leave to the defendant to move, and a verdict was found for the plaintiff.

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Erle now moved to enter a nonsuit. The Stamp Acts, 44 Geo. 3, c. 98, Sched. (A), and 48 Geo. 3, c. 149, Sched. (I), pt. 1, impose a duty on every "copy attested to be a true copy, in the form which hath commonly been used for that purpose, or in any other manner authenticated or declared to be a true copy, or made for the purpose of being given in evidence as a true copy of any agreement, contract, bond, deed, or other instrument of conveyance, or any other deed whatsoever," and it is declared, "that all copies which shall, at any time, be offered in evidence, shall be deemed to have been made for that purpose." The only exception is, where the document, purporting to be a copy, is not read in Court, but is used as a mere memorandum for the purpose of refreshing the memory of a witness.

LORD ABINGER, C. B.—The clauses referred to in the Stamp Act, appear to me to relate only to such copies as are evidence per se, and that the word "copy," there used, means an authenticated copy receivable as evidence in the first instance. Here, the copy was used as secondary evidence only.

(a) A question was also raised, as to whether this agreement for a lease and occupation under it, amounted to a demise; the Court decided in the affirmative.

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PARKE, B.—I am also of opinion that no stamp was required, for though the document might, in form, have been read as a copy of the original, yet it was, in truth, only read as a memorandum, to refresh the memory of the witness, who had compared it with the deed he had read.

GURNEY, B., concurred.

ROLFE, B.—If you look to the context of the Schedule of the 48 Geo. 3, c. 149, it will be evident that the word “copy,” is not used in its ordinary sense, for a higher rate of duty is first imposed on copies authenticated or attested, for the security or use of any person being a party thereto, or taking any benefit or interest immediately under it; and afterwards a lower rate of duty is imposed, when the copy is made for the use of any other person, not being a party thereto, or taking such interest or benefit.

Rule refused.

ROUND v. HATTON.

An action of

THIS was an action of trespass for breaking and entering

trespass to carry out the provisions of the Statute in relation to the subject



awarded, that, after deducting certain sums, "the plaintiff is entitled to receive from the defendant the sum of 153*l.* 11*s.* 6*d.*, which, together with the said sums above directed, to be deducted, I settle to be the price at which the defendant shall purchase the plaintiff's said property." The arbitrator further directed, that the defendant, after the conveyance of the property to him, should be entitled to use the plaintiff's name in enforcing all rights and remedies against certain parties.

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W. H. Alexander had obtained a rule nisi to set aside this award, on the grounds; first, that it was uncertain, in not specifying the property in question; secondly, that the arbitrator had exceeded his authority, in directing that the defendant should be entitled to sue in the plaintiff's name.

R. V. Richards and *F. V. Lee* shewed cause. All that is referred to the arbitrator is to settle at what price and on what terms the defendant shall purchase the plaintiff's property, and that he has done. The general form of the award includes the subject matter of the action; but as the terms both of the order of reference, and of the declaration, are general, it must be shewn by extrinsic evidence what the property is. An award may be rendered certain by that species of proof. As to the second objection, it was held, in *Burton v. Wigmore* (*a*), that an arbitrator, who had authority to decide the terms on which a partnership agreement should be cancelled, did not exceed his authority by awarding that one of the partners should be entitled to sue in the name of the other.

W. H. Alexander, in support of the rule. The award is uncertain. It is difficult to conceive a word more vague than the word "property." In ordinary language, it is used in a double sense. The arbitrator should have found

(*a*) 1 Scott, 610; S. C. 1 Bing. N. C. 665.

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specifically of what the property consisted. Secondly, there is nothing in the terms of the order of reference to authorise the arbitrator to direct the plaintiff's name to be used by the defendant.

LORD ABINGER, C. B.—If there had been any doubt as to what the property consisted of, I should have thought this award void, but looking at the case disclosed by the affidavits, it does not appear that there ever was any dispute as to what the property was. The parties agree to refer an action for a trespass to property mentioned in the declaration, that is, all the plaintiff's property. The rule of reference refers to "the plaintiff's property," and there is nothing to oblige the arbitrator to set it out by metes and bounds. The meaning of the word "property" must be considered as settled amongst the parties. As to the other objection, it seems reasonable that some such condition should be imposed, and whether or not the arbitrator would direct to the defendant to indemnify the plaintiff was a matter entirely within his discretion.

PARKE, B.—I am of the same opinion. It is clear, that the arbitrator had no power to decide what property should be conveyed, but only to fix the price and the terms of conveyance; what the parties mean by the word "property"

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Doe dem. CARTER and Others v. ROE.

IN this action of ejectment a rule had been obtained, calling on one Griffin, the tenant in possession, to shew cause why, on being admitted defendant, besides entering into the common rule and giving the common undertaking, he should not enter into the recognizance required by the 1 Geo. 4, c. 87, s. 1 (a), to pay the costs and damages

A tenant holding from quarter to quarter, subject to a determination of the tenancy, by three months' notice to quit, cannot be compelled to enter into the recognizance prescribed by the 1 Geo. 4, c. 87, s. 1.

(a) After reciting "that the laws heretofore made for preventing the losses to which landlords are exposed by the unlawful holding over of lands and tenements, by tenants or persons claiming under them, after the expiration or legal determination of their terms or interests, have been found by experience insufficient, and it is therefore expedient to provide in certain cases a more expeditious mode for recovering the possession of lands and tenements so held over: enacts, That where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing, any lands, tenements, or hereditaments, *for any term or number of years certain, or from year to year*, shall have expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of

such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the Court in which the action shall have been commenced, on the first day of the Term then next following, or if the action shall be brought in Wales, or in the counties palatine of Chester, Lancaster, or Durham respectively, then on the first day of the next session or assizes, or Court day, or other usual period for appearance to process then next following, (as the case may be,) there to be made defendant, and to find such bail, if ordered by the Court, and for such purposes as are hereinafter next specified, and upon the appearance of the party at the day prescribed, or in case of non-appearance on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit

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which should be recovered by the plaintiff. It appeared that Griffin had been let into possession of the premises in question by one Collins, who was the tenant of one Spenlove, under a memorandum of agreement, by which Collins was to hold the premises from the 31st of December, 1840, as tenant from quarter to quarter, at the quarterly rent of five guineas. The agreement contained a stipulation by Collins, to obtain a license to sell ale, and that he would deliver up possession at the end of any three calendar months, upon receiving notice in writing, and that if he should lose his license, he would quit possession on being requested by Spenlove, and without notice. The lessors of the plaintiff were the devisees of Spenlove, and had given

and upon affidavit, that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the Court for a rule for such tenant or person to shew cause, within a time to be fixed by the Court on a consideration of the situation of the premises, why such tenant or person upon being admitted

a recognizance by himself, and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the Court, upon cause shewn, or upon affidavit of service of the rule, in case no cause shall be shewn, to make the same absolute in the whole or in part, and to order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such

the tenant three months' notice to quit, which expired on the 31st of March, 1842.

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Marsh shewed cause. This is not a tenancy within the 1 Geo. 4, c. 87, s. 1. That statute applies only to a tenancy "for any term or number of years certain, or from year to year." The present case is distinguishable from *Doe dem. Phillips v. Roe (a)*, for that was a tenancy for three months' certain, and was, therefore, held to be a tenancy for a term. The Courts have been anxious not to extend the provisions of the statute. In *Doe dem. Pemberton v. Roe (b)*, it was held, that a tenancy for ninety-nine years, determinable on lives, was not a holding for "any term or number of years certain." A tenant who has surrendered his term, but refuses to quit the premises, cannot be compelled to enter into this recognizance. *Doe dem. Tindal v. Roe (c)*, and *Doe dem. Cardigan v. Roe (d)*, decided that the statute applied to those cases only, where the lease had expired by mere efflux of time, and not to a tenancy determined by notice to quit, either to or from the landlord, where there was a subsisting lease for fourteen years, determinable at the end of the first seven, and determined by a notice under the lease.

Bros, in support of the rule. The effect of the agreement is to constitute a tenancy for half a year certain. The holding is from quarter to quarter, so that there would be no period at which the tenant would not have a term certain. A holding for a portion of a year, is a holding for a term within the statute.

LORD ABINGER, C. B.—It would seem that the Legislature intended to make a distinction between a tenancy from year to year, and a tenancy for a year certain, or a

(a) 5 B. & Ald. 766.

2 B. & Adol. 922.

(b) 7 B. & C. 2.

(d) 1 D. & R. 540.

(c) *Ante*, vol. 1, p. 143, O. S. ;

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term certain, as for instance, three months' certain. The rule must be discharged, but as there was a reasonable doubt whether the case was within the act, it must be discharged without costs.

PARKE, B.—This tenancy is not for a term certain, as it depends upon the time at which notice to quit is given. If a quarter's notice is given on the first day of the quarter, the term is certain, otherwise it is not.

ALDERSON, B.—I am of the same opinion. The mere insertion in the agreement, of a particular time, determinable by notice to quit, does not render the holding for a term certain.

ROLFE, B., concurred.

Rule discharged, without costs.

—◆—
 BOURKE v. LLOYD.

Where a cause
 is referred to
 arbitration, and
 the costs of the
 cause are to

DEBT for money lent, money paid, interest, and for money due on an account stated: Pleas, nunquam indebtedness and payment.

Cooling shewed cause. No verdict having been taken in this case, it was unnecessary for the arbitrator to find specifically on each issue. But the award, in fact, amounts to a finding for the plaintiff on both issues. The arbitrator states that the plaintiff had good cause of action against the defendant, and directs the defendant to pay the plaintiff 20*l*. In *Dicas v. Jay* (a), the declaration contained eleven special counts for negligence, and the arbitrator having found that the plaintiff had good cause of action for a certain sum, for which he directed a verdict to be entered, the award was held sufficient. In *Duckworth v. Harrison* (b) the general issue and a set-off were pleaded, and the cause was referred, "the costs of the reference and award to abide the event of the award;" the arbitrator found that the plaintiff had not, at the commencement of the action, or at any time afterwards, any cause of action against the defendant, and it was held, that he had determined the action, and was not bound to decide upon each issue, unless he was requested so to do. That case supported the previous decision in *Dibben v. The Marquis of Anglesea* (c). In the present case there can be no difficulty in taxing the costs, as the arbitrator has in effect found for the plaintiff on both issues. He also referred to the judgment of *Coleridge, J.*, in *England v. Davison* (d).

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 }
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Ramshay, in support of the rule. By the 1 Reg. Gen., H. T., 2 Wm. 4, s. 74 (e), "no costs shall be allowed on taxation to a plaintiff on any writs or issues upon which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." The arbitrator was, therefore, bound to find distinctly on each issue, otherwise there is no legal event which can authorize the taxation of costs. In *Norris v. Daniel* (f), the

(a) 5 Bing. 281.

(b) *Ante*, vol. 7, p. 71, O. S. :
 4 M. & W. 432.

(c) 2 C. & M. 722.

(d) *Ante*, vol. 9, p. 1057, O. S.

(e) *Ante*, vol. 1, p. 193, O. S.

(f) 10 Bing. 507.

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costs of the action and of the award were to abide the event of the award, and the arbitrator found that the plaintiff had a good cause of action on five out of eight counts, that the defendant should pay 5*l.* damages, and that no further proceedings should be had in the action; the Court held that there was no award as to the three counts, no event to authorize the taxation of costs on those counts, and that, consequently, no part of the award could stand. So in *Gisburne v. Hart* (a), where the declaration contained a count on a promissory note, and on an account stated, and the arbitrator found that the plaintiff had good cause of action for, and was legally entitled to recover from the defendant the amount of the promissory note; it was held, that the award was bad, as there was no adjudication upon the other issue. *Duckworth v. Harrison* is distinguishable, because there, the order of reference did not direct that the costs of the action should abide the event of the award. In *Doe dem. Madkins v. Horner* (b), where the costs of an action of ejectment were to abide the event of the award, the award was held bad, for not stating on which demise the plaintiff was entitled to succeed. *England v. Davison* is an express authority to shew that where a cause in which several issues are raised on the pleadings is referred, the arbitrator is bound to find expressly on each, although he is not requested by the parties so to do; *Hunt v. Hunt* (c)

more than once laid down by this Court, that where an action is referred generally to an arbitrator, and the costs of the cause are distinctly to abide the event of the award, and there are several issues joined, he ought to award upon each issue, in order to determine what are the costs which are to abide that event. That has been settled by several cases, and discussed more than once in this Court. Mr. Justice *Coleridge* was supposed, in his judgment in the case of *England v. Davison*, to have said, that this Court, in a judgment given by me, had overruled those cases, and had intended to set up a case decided in the time of Lord *Lyndhurst* (a), which had a different aspect. Now, looking at the judgment in *Duckworth v. Harrison*, which is the case referred to, it appears to me, that it has been misunderstood. That was the case of a construction put by the Court on a rule of reference, in which the costs of the reference and award were to abide the event of the award, but the costs of the action were not there distinctly made to depend on the award of the arbitrator. In delivering the judgment of the Court I had stated that which I still adhere to, and although the Court entertained some doubt at first, they finally came to the same conclusion, that to make it incumbent on the arbitrator to find upon each issue, words ought to have been introduced into the rule of reference, to shew that he was bound so to find, or that the costs were to abide the event of the cause; whereas, in that case, there was merely an agreement, that the costs of the reference and award were to abide the event of the award, and as the other stipulation was by implication excluded, it did not follow that the arbitrator was bound to award upon each issue. That was my meaning at the time, and if rightly understood, that is the meaning of the judgment. We are, therefore, of opinion, that the cases must be adhered to, and that where an action is referred to an arbitrator, and the costs of the action are to abide the event of the award, each

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(a) *Dibben v. The Marquis of Anglesea*.

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issue must be found specifically by the arbitrator, otherwise the Master has no rule of proceeding as to the costs. We think, therefore, that the rule to set aside the award ought to be made absolute.

Rule absolute.

ROBERTS v. ELSWORTH.

A declaration contained two counts on two promissory notes for 50*l.* each, and also a count on an account stated. The particulars of demand stated that the plaintiff sought to recover 50*l.*, the amount of the note in the first count, and 50*l.* the amount of the note in the second count, for the recovery whereof he would avail himself of the whole or any part of the de-

ASSUMPSIT. The first count of the declaration was on a promissory note, dated the 11th of February, 1839, made by the defendant, for payment to the plaintiff of 50*l.* with interest. The second count was on a similar note to that in the first count. There was also a count for money lent, and for money due on an account stated.

The particulars of the plaintiff's demand were as follows. — This action is brought to recover the sum of 50*l.*, being the amount of the promissory note mentioned and set forth in the first count of the said declaration in this cause, together with interest thereon, from the 11th day of February, 1842, till paid. Also the further sum of 50*l.*, being the amount of the promissory note mentioned and set forth in the second count of the declaration in this cause, together with interest thereon, from the 11th day of February,

It was objected that the plaintiff was not entitled, under his particulars, to give this evidence in support of the count on an account stated. The learned judge admitted the evidence, reserving leave to the defendant to move to enter a nonsuit, and a verdict was found for the plaintiff. A rule nisi having been obtained accordingly,

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W. H. Watson and *Macauley* shewed cause. The defendant could not have been misled by the particulars. They state, in effect, that the plaintiff seeks to recover the amount of the two promissory notes, and to recover that amount under the count on an account stated. In *Fisher Wainwright* (a), the first count stated a special contract to indemnify the plaintiff against costs he might incur by paying a bill of exchange drawn by the defendant, and suing the acceptor thereof; the second count was on a bill of exchange, and there were also counts for money paid, interest, and on account stated; and it was held that the plaintiff might recover on the account stated under particulars referring to the costs named by the plaintiff, and the amount of the bill. The true criterion is, whether the particulars are calculated to mislead the defendant, *Davies v. Edwards* (b), *Hay v. Fisher* (c), *Cooper v. Amos* (d), *Lambirth v. Roff* (e).

Erle, contra. The evidence tendered would apply equally as well to a count for goods sold, or for money lent, as to a count on an account stated. In *Breckon v. Smith* (f), the plaintiff declared for goods sold, and on an account stated, and the particular was "to a beast sold and delivered, 13*l.* 10*s.*," the only evidence was an admission by the defendant, to a third person, that he owed the plaintiff 13*l.* 10*s.*; it was held that this was no evidence of an account stated, and that it was not evidence on the count for goods sold, as it was not shewn to be applicable to the par-

(a) *Ante*, vol. 5, p. 102, O. S.

(b) 3 M. & Sel. 380.

(c) 2 M. & W. 722.

(d) 2 C. & P. 267.


(e) 8 Bing. 411.

(f) 1 Adol. & E. 488.

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ticular. The particular in the present case, in effect, is this, "I seek to recover a sum not exceeding 100*l*., being the amount of the two promissory notes mentioned in the declaration." The defendant has a right to know in respect of what the account has been stated. [Lord *Abinger*, C. B.—It is assumed that the particulars had no relation to the account stated, but if the defendant had not sufficient information, he might have asked for better particulars. Suppose the plaintiff had said, "I seek to recover 100*l*., due to me on an account stated on the 11th of February, 1842," would not that have been sufficient? This particular is substantially the same; it means, "I seek to recover the sum of 100*l*., mentioned in the two notes upon the account stated."] It is submitted, that under this particular, the plaintiff was bound to produce evidence in support of the notes.

LORD ABINGER, C. B.—I am forced to decide against the opinion which I expressed at the trial. I should have thought that if it appeared from the whole particular, what the plaintiff was seeking to recover, that would be sufficient. Now here, the particular means, that the plaintiff seeks to recover on an account stated with reference to those bills. I am sorry that the rest of the Court are of a different opinion, because the justice of the case requires that the



he has not done, and there is no proof that any promissory notes existed. If we strike out of the particulars, all that relates to the promissory notes, there would be merely a statement that the plaintiff sought to recover 100% for something, and he would not be tied down to prove the exact sum.

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GURNEY, B.—I have some doubt whether the defendant ought not to have made an affidavit that he was misled.

ROLFE, B., concurred.

Rule absolute accordingly.

EDEN v. TURTLE.

ASSUMPSIT on a bill of exchange, drawn by one Harrison upon, and accepted by, the defendant.

Plea. That the defendant being indebted to J. M., in a certain sum of money, Harrison drew the said bill, and the defendant accepted the same, for a special purpose only, that is to say, that after the acceptance of the bill by the defendant, and after the delivery of it to Harrison, that he should hold the same for the sole use and benefit of the defendant, and get the same discounted for him, and pay the proceeds thereof to J. M., in satisfaction of his debt: that the defendant, at the request of Harrison, before the bill became due and payable, accepted the said bill for the same special purpose, and not otherwise; and at the like request delivered the same to Harrison, who received it, and from thence, until the delivery thereof to the plaintiff, held the same for such special purpose, and for the sole use and benefit of the defendant: averment of no consideration for the acceptance or payment of the bill, and that before the bill became due, Harrison, in violation of good faith,

To an action against the acceptor of a bill of exchange, the defendant pleaded that being indebted to M., he accepted the bill, and delivered it to the drawer for a special purpose: viz. that he should get it discounted, and pay the proceeds to M., and that the drawer held the bill for such special purpose, and for the sole use and benefit of the defendant.

Replication, that the drawer did not hold the bill for the said special purpose, and for the sole

use and benefit of the defendant: *Held*, on special demurrer, that the traverse was not too large.

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and of the special purpose for which the same was delivered, indorsed the bill to the plaintiff, in discharge of a debt due from Harrison to the plaintiff, &c.

Replication. That the said bill was not made and drawn by Harrison upon, or accepted by, the defendant, nor did the defendant deliver the same to Harrison, nor did he receive or hold the same for the special purpose mentioned, and for the sole use and benefit of the defendant, *modo et formâ*.

Special demurrer, assigning cause: that the traverse that the bill was not delivered for the said special purpose, *and* for the sole use and benefit of the defendant, is a traverse in the conjunctive, whereas the traverse should have been in the disjunctive.

Peacock, in support of the demurrer. The traverse is too large, and compels the defendant to prove, not only that the bill was given for the special purpose mentioned, but also that it was given for the sole use and benefit of the defendant. In *Stephen on Pleading* (a), it is said, that "a traverse may be too large by being taken in the conjunctive instead of the disjunctive;" and *Goram v. Sweeting* (b) is cited, where the plaintiff declared on a policy of insurance, and averred, that the ship insured did not arrive in safety, "but that the said ship, tackle, apparel, ordnance, munition,

charges at law *and* in equity, was held bad. So in *Stubbs v. Lainson* (a), where the declaration alleged that the sheriff seized, and took in execution, and levied certain goods, a plea that he did not seize, and take in execution, *and* levy, was held bad. If the replication had been *de injuriâ*, the defendant would have succeeded, by proving either the special purpose, or the delivery of the bill for the defendant's sole use. [*Rolfe*, B.—Does not the replication mean that the bill was not delivered for the said special purpose; that purpose being for the sole use and benefit of the defendant?] The issue would not be proved by the mere evidence of the delivery of the bill to Harrison for the special purpose.

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Butt, *contrâ*. The traverse is, in fact, a traverse of the special purpose only, and compels the defendant to prove no more. In *Stubbs v. Lainson*, it would have been necessary for the plaintiff to have proved, not only a seizure, but a levy also.

Peacock replied.

Lord ABINGER, C. B.—I am of opinion that the replication is sufficient. The view I take is, that where a replication traverses the facts alleged in the conjunctive, and thereby imposes upon the defendant the obligation of proving more than he would be bound to do under a traverse in the disjunctive, it is bad. But in this case the replication will subject the defendant to prove the same facts as a traverse in the disjunctive, he will be obliged to prove no more than is necessary to support his plea. If the replication *de injuriâ* would not have obliged him to prove both allegations contained in the plea, this form of replication will not. The allegations in the plea only amount to this, that the defendant accepted and delivered

(a) *Ante*, vol. 5, p. 162, O. S.; 1 M. & W. 728.

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the bill for his sole use, under the special circumstances mentioned.

PARKE, B.—I am of opinion that replication is good. It traverses the allegation in the plea that Harrison held the bill for the special purpose mentioned, *and* for the sole use and benefit of the defendant. The traverse is in the precise words of the plea, and the question is, whether that traverse compels the defendant to prove more than he would otherwise be bound to prove in support of his plea? I think it does not. The defendant could not support his plea by merely shewing that the bill was delivered to Harrison for the defendant's sole use, but he must have shewn that it was delivered to him for the special purpose of being discounted, and the proceeds applied in payment of the defendant's debt. If the defendant could have succeeded, by shewing a deposit unconnected with any special purpose, I should have thought the replication bad; but the traverse does not compel him to prove more than he would otherwise be bound to prove in support of his plea.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. The plea states in effect, that the bill was delivered for a special purpose,

1842.

SANDFORD v. ALCOCK.

THIS was a motion to set aside an order of Lord *Denman* to amend the *postea*. A rule nisi had been granted on the authorities of *Pauly v. Holly* (a), to set aside the verdict, on the ground that the jury at the trial had not found the value of each article for which the action was brought. (b) It was an action of detinue for six pieces of timber, and a four-wheeled carriage; the jury returned a general verdict of "damages 12*l.*, to be reduced to 1*s.*, on giving up the timber and carriage." There was some, but conflicting, evidence at the trial, of the value of the timber, viz., 2*l.*, but no question was asked about, nor did the jury find the value of the carriage, separatim. On the 19th of November, a summons was taken out, returnable before Lord *Denman*, at half-past nine o'clock, on the 22nd, to amend the *postea*. The order was made, but was not drawn up until the 23rd, and not served until four o'clock on the 24th, (the 25th being last day of Term.) The order was to distribute the damages thus, viz., 2*l.* for the timber, and 4*l.* for the carriage.

If a *postea* is amended, a party is not bound to draw up and serve the order "forthwith," if his opponent can take no fresh step; and, therefore, such an order drawn up on the 23rd, pursuant to an order made on the 22nd, was held to be served in sufficient time on the afternoon of the 24th, all those days being in Term.

There is no appeal to the Court above to contest a Judge's discretion, as to the amendment of a *postea*, because there is no power to compel a production of his notes of the trial. Lord *Abinger*, C. B.

Atkinson moved to set aside that order, on two grounds; first, because Lord *Denman* had no authority; and, 2ndly, because the plaintiff, by not drawing up and serving the rule in due time, had abandoned it. It was contended he had no authority, because there was nothing on his notes to amend by. There was some evidence that the timber was worth 2*l.* But what was the value of the carriage? [Lord *Abinger*.—Why, the remainder must, of course, be the value of the carriage.] No; the rest, if not the whole,

(a) 2 Bl. Rep. 853, and Chan. Ca. 10, Rep. 119 b.

(b) Vide 1 Selw. N. P. (De-

tinue,) where all the authorities are carefully collected.

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might be damages for the detention of the timber, and the legal inference was so. The order itself also clearly shews the want of authority, for, by the order itself, the carriage was valued at 4*l*., not for the remainder. Besides, if the value of the timber was 2*l*., and that of the carriage 4*l*., what became of the residue of the 12*l*. so found by the jury? There were still 6*l*. wholly unaccounted for; no value was found, only damages. On the second point, it was contended, that the order ought to have been drawn up and served, either on the 22nd or 23rd at the latest, and that plaintiff not having done so until four o'clock on the 24th, the order was to be taken as abandoned, for, by all the authorities, it was clear that it must be drawn up and served "forthwith," otherwise it might be treated as waived; it might be, in this case, that the defendant could not, ad interim, take any fresh step, but the rule was imperative in all cases, whether a fresh step could be taken or not; the opposite party had a right to know, within a reasonable time, in every case, whether the rule was to be drawn up or not (a).

Lord ABINGER, C. B.—I think we ought not to hear an application to set aside an order to amend the *postea*. There can be no appeal to the Court to control a Judge's discretion as to such an amendment, for, there is no power

1842.

WILLS v. DAWSON.

THIS was a rule, calling on the plaintiff to shew cause why a writ of summons, or the service thereof, should not be set aside for irregularity. The objection was, that the writ bore date 1002 instead of 1842. The rule was obtained upon an affidavit, the jurat of which was as follows:

Sworn at the city of Exeter, this 10th day of November, eighteen hundred and forty-two. Before me, and I certify that the	}	The mark of + ROBERT WILLS.
--	---	-----------------------------------

+

~~A commissioner for taking affidavits in this Court.~~

(on the other side of the paper)

+ above affidavit was read over, in my presence, to the defendant, who seemed perfectly to understand the same, and made his mark thereto in my presence.

JOHN GIDLEY,

A commissioner for taking
affidavits in the said Court.

Part of the jurat of an affidavit was written on one side of the paper, and below it the words "a commissioner for taking affidavits in this Court" were erased; the remainder of the jurat was written on the other side of the paper: *Held*, that the affidavit was not vitiated thereby.

The date in a writ of summons was 1002, instead of 1842: *Held*, that a motion to set aside the writ or service was not irregular.

Corrie shewed cause, and objected that the affidavit was inadmissible, by reason of the erasure in the jurat. In *Williams v. Clough (a)*, it was held, that a line drawn through two words in the jurat of an affidavit was an erasure which vitiated the affidavit, though the omission or retention of the words would not vary the sense.

Lord ABINGER, C. B.—The erasure does not vitiate the

(a) 1 Adol. & E. 376.

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affidavit. It would bring disrespect on the administration of justice to allow such an objection.

ALDERSON, B.—The person who wrote the affidavit evidently thought there would be room enough for the jurat at the bottom of the page, but finding there was not, he erased the words in question, and concluded the jurat on the other side of the paper. The erased words are so unconnected with the rest of the jurat, that they might be removed without affecting it. I recollect, once, an objection being taken, that the parchment of a deed was not indented, when an eminent Judge took out a pair of scissors, and converted the deed poll into an indenture: here, the erased part might be cut off without touching the affidavit or jurat.

Corrie then contended that the rule was informal: the proper application was to set aside the service of the writ, not the writ or service. In *Truslove v. Whitechurch* (a), it was held, that where the copy served was defective, the proper form of motion was to set aside the service.

Warren, in support of the rule, was stopped by Court.

LORD ABINGER, C. B.—The defendant is entitled to



1842.

TEGGIN and Another, Executors, &c. v. LONGFORD.

IN this case, the sheriff had applied for an interpleader rule, by summons, before a Judge at Chambers, according to the provisions of the 1 & 2 Vict. c. 45, s. 2, and on the 4th day of July 1842, an order was made directing the trial of an issue. Afterwards, a summons was taken out to rescind that order, when the following order was made by *Coleridge, J.*:

The Court has jurisdiction to review an interpleader order made by a Judge at Chambers, under the 1 & 2 Vict. c. 45, s. 2.

“Upon hearing the attorneys or agents for the plaintiffs for the claimant, and for the sheriff of Somersetshire, I do order that so much of the interpleader order, herein dated the 4th day of July 1842, as directs an issue to be tried, be rescinded, no issue having been delivered. And that the said sheriff do forthwith pay the plaintiffs the produce of the sale under the said order; and that the claimants’ attorney do pay the costs of the application, (to be taxed) to the plaintiffs, their attorney or agent.”

Warren, had obtained a rule to set aside so much of the above order as directed the claimant’s attorney to pay the costs of the application, against which,

Montague Smith shewed cause. The Court has no jurisdiction to review the order of *Coleridge, J.* That order was made under the provisions of the second section of the 1 & 2 Vict. c. 45, which enacts, “that it shall be lawful for any Judge of the said Courts of Queen’s Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those Courts to exercise such powers and authorities for the relief and protection of the sheriff or other officer as may by virtue of the said last-mentioned act, (1 & 2 Wm. 4, c. 58, s. 6) be exercised by the said several Courts respectively, and to make such order therein as shall appear to be just, and the costs of such proceeding shall be in the discretion of such Judge.” A Judge acting

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under that statute has a co-ordinate power with the Court. *Burgh v. Schofield (a)*, is expressly in point. [Lord Abinger, C. B.—In that case, the Judge made no order as to costs, and the Court declined to interfere; but this is an appeal from the Judge's decision.] Where a Judge acts as the Court, there can be no jurisdiction by way of appeal. The case resembles that of a Judge sitting in the Bail Court. [*Parke, B.*—Must not the statute mean that the Judge may exercise the power, subject to his decision being reviewed by the Court, if wrong, in the same way as Judges' orders are?] The case is expressly provided for by the 1 & 2 Wm. 4, c. 58, which enacts, "that every order to be made in pursuance of that act by a single Judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge." The 1 & 2 Vict. c. 45, contains no provision of that kind. [*Rolfe, B.*—It gives the Judge the same power only as he had under the former act in cases not within the sixth section. The words are, "to exercise such powers and authorities for the relief and protection of the sheriff or other officer as may by virtue of the said last mentioned act be exercised by the said several Courts respectively."]

Warren, in support of the rule was stopped by the Court.

returned that they found money of the defendant in the hands of the Accountant-General of the Court of Bankruptcy, which money "they had seized unto the hands of our Lady the Queen." In Hilary Term 1842, an order was made upon the sheriffs to pay over that money to the crown (a). The sheriffs thereupon petitioned the Court of Bankruptcy that the money should be paid out of the hands of the Accountant-General in Bankruptcy to the sheriffs for the use of the crown. The Judge of the Court of Bankruptcy made an order accordingly. The assignees of the defendant then petitioned the Lord Chancellor for an order for a special case to review the decision of the Judge of the Bankruptcy Court. The matter was again heard before the Judge of the Court of Bankruptcy, when he rescinded his former order, on the ground that the sheriff had no locus standi in the Court of Bankruptcy.

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W. H. Watson obtained a rule to shew cause why the above order should not be discharged, and why the sheriffs should not be at liberty to amend their return, against which,

Jervis shewed cause. There are two modes by which the crown obtains possession of the debts or chattels of the debtor. The one is, where the sheriff returns that the debtor is possessed of certain goods which the sheriff has seized into the hands of the crown, or the sheriff returns that a third party has possession of the goods, so as to enable the crown to issue a scire facias. In this case, the sheriff has created the difficulty by his informal return. He found by his inquisition that the money was in the hands of the Accountant-General of Bankruptcy, and therefore, should not have returned that he had seized the money absolutely.

(a) See the case, *ante*, vol. 1, p. 666, N. S.

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Lord ABINGER, C. B.—I think the rule ought to be absolute for the discharge of the order.

Rule absolute.

THOMAS v. The Mayor, Aldermen, and Burgesses of the
BOROUGH of SWANSEA.

The town council of a borough resolved "that one hundred guineas be fixed as the salary of the town-clerk for his attendance on the business of the council and committees, and that he be paid the usual charges in defending and bringing actions."

On motion to review the taxation of the town-clerk's bills: *Held*, that the Master proceeded on the right

THIS was an action for work and labour as an attorney and solicitor. On the 1st of January, 1836, the plaintiff was appointed town-clerk of the borough of Swansea, and at a meeting of the council of the borough, on the 5th of February, 1836, it was resolved, "that the sum of one hundred guineas be fixed as the salary of the town-clerk, for his attendance on the business of the council and committees in Swansea, and that he be paid the usual charges and expenses in defending or bringing actions, &c." The plaintiff's claim consisted of twelve bills of costs for business done by him for the corporation. These bills having been referred for taxation.

In bill, No. 1, the following charges in respect of the revision of the burgess list were disallowed.

Writing letters requesting overseers to bring in their list

Drawing notice of the election,
 Copying burgess lists into two books for poll books,
 Attending at the election,
 Drawing notice to councillors of their election, and getting
 same printed,

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Writing to councillors requesting them to qualify.

The only sums allowed under this head were the payments actually made.

Of the charges in respect of the election of assessors and auditors, the following were disallowed :—

. Notice of the election,

Copying ward lists into books for poll books,

Town-clerk and his clerk attending the election,

Drawing notice of persons elected to publish in newspaper,

Writing to inform auditors and assessors of their election.

And the Master allowed only payments made.

In bill, No. 3, consisting of miscellaneous items, the following charges were disallowed :—

For a return required by the Secretary of State of the number of persons qualified to vote for a member of Parliament, and for councillors,

Drawing, copying and engrossing a proposed bye-law, and putting same on town-hall door,

Fifteen notices to quit.

This latter item was disallowed, on the ground that it was not in fact given by the town-clerk, but by the receiver of the corporation whose business it was.

A return required by the Secretary of State of the overseers whose duty it was to prepare lists of voters.

The Master disallowed all charges for business done in respect of duties which the plaintiff, as town-clerk, was required to perform by the Municipal Corporation Act, the Master considering that such charges were included in the salary of 105*l.* per annum.

V. Williams had obtained a rule, calling on the defendants

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to shew cause "why the Master should not review his taxation of the plaintiff's bills of costs in this action, and state the amount of each class of items disallowed, reserving the question of their being paid for by the salary for a jury or a special case.

Crompton and *Cowling* shewed cause. The taxation proceeded on the principle laid down in *Jones v. The Mayor of Carmarthen* (a). In that case the town-clerk had no fixed salary, yet the Court held that he was not entitled to recover for fees in respect of duties imposed on him, either by the Reform Act, or the Municipal Corporation Act. The 16th section of the 5 & 6 Wm. 4, c. 76, (The Municipal Corporation Act,) enacts, "that in any borough in which there shall be no town-clerk, or in which the town-clerk shall be dead or incapable of acting, all matters by that act required to be done, by and with regard to the town-clerk; shall be done by and with regard to the person executing duties in such borough, similar to those of the town-clerk, and if there be no such person, or if such person shall be dead or incapable of acting, then with regard to such fit person as the mayor of such borough shall appoint in that behalf." The Master is the proper person to tax the bill, and the plaintiff should have pointed out to him the specific items objected to. All the charges

[Lord Abinger, C. B.—The plaintiff should have pointed out the particular items improperly disallowed.] In the bill 3 and 9, there are items for business done as an attorney, which the Master has disallowed, on the ground that they are for duties belonging to the office of town-clerk. He has also disallowed attendance and advice on the business of the corporation not required of him by virtue of his office.

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LORD ABINGER, C. B.—I think the Master is right. He may, perhaps, have improperly disallowed some particular items, but those should have been distinctly brought before us. There can be no doubt about the correctness of the principle laid down in *Jones v. The Mayor of Carmarthen*, and the Master has acted upon it. The salary of one hundred guineas was given as a remuneration for business to be done, and was not exclusively confined to the business of a town-clerk.

PARKE, B.—I am of the same opinion. Upon reading the affidavits, it is perfectly clear, that the Master has proceeded on the true principle. The case depends, first, on the construction of the Municipal Reform Act, about which there is no doubt; and, secondly, on the construction of the resolution, the meaning of which is, that all business, except defending and bringing actions, is to be paid for by an annual salary of one hundred guineas. The rule ought to be discharged.

GURNEY and ROLFE, B.'s, concurred.

Rule discharged.



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PRYME v. TITCHMARSH.

An objection to the jury summoned on a writ of trial, that they are not on the jury list for the county, is waived by the defendant acquiescing in the trial by that jury, though he was not, at the time, aware of the objection.

Quere, whether a defendant on a writ of trial, has a right of challenge.

THIS was an action of debt, and was tried before the under sheriff of Cambridgeshire, when a verdict was found for the plaintiff on one of two issues.

Cleasby had obtained a rule nisi to set aside the verdict, and for a new trial; it appeared from the affidavits, that during the trial the defendant came into Court, and finding that one of the jurymen was the same person who had served him with process in the action, he informed his attorney thereof, but no objection was made at the time. It was afterwards discovered that the jury who tried the cause, consisted entirely of persons resident in the town of Cambridge, and that none of their names were in the jury list for that county. The defendant's attorney had seen the list before the trial, and on looking it over, expressed himself satisfied. *Farmer v. Mountfort (a)* was cited.

Macaulay shewed cause. The 3 & 4 Wm. 4, c. 42, s. 17, which gives power to the Court or Judge to direct issues to be tried before the sheriff, enacts, that "for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by

tained in the jurors' book, for the then current year, &c., "provided always, that if there shall be no jurors' book in existence for the current year, it shall be lawful to return jurors from the jurors' book for the year preceding." Assuming these provisions to be applicable to the case of jurors summoned upon a writ of trial, the affidavits in support of this motion, do not shew that the names of the jurors are not in the book for the current year. Besides, any objection to the jury must be considered as waived, by the defendant's attorney having looked over the list, and expressed himself satisfied. *Regina v. The South Holland Drainage Committee-men (a)*, is an authority in point.

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Cleasby, in support of the rule. It does not appear that the defendant's attorney knew that the jurors were not on the list for the county, and unless he was cognizant of that fact, there could be no waiver. [*Parke*, B.—The objection might be good if taken at the proper time and place, but the defendant has acquiesced.] Not with knowledge of the objection. [*Parke*, B.—That is immaterial, he consents to a trial by that particular jury.] The defendant had no right of challenge. [*Parke*, B.—That is a reason why the defendant should have made inquiry before he consented to have the cause tried by that jury.]

LORD ABINGER, C. B.—I do not pronounce any definite opinion as to whether a sheriff, to whom a writ of trial is directed, is bound to summon the jury from persons who are in the jury book. In the case of writs of inquiry, the practice used to be to take the jury from the bystanders, and as those persons were not necessarily freeholders, no challenge was allowed. My judgment proceeds on the ground that the defendant is precluded from saying that the cause was not tried by a proper jury, when he has acquiesced in a trial by the jury summoned. He should

(a) 8 Adol. & E. 429. S. C. 1 P. & D. 79.

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have made some previous inquiry, and have taken the objection at the proper time.

PARKE, B.—I am of the same opinion. It is not necessary to determine whether the sheriff was bound to take a jury from the list of persons in the jury book, or whether, upon a writ of trial, a defendant has a right of challenge, the latter question especially might require consideration. It is enough to say, that the defendant ought to make inquiry, and take the objection at the earliest possible period. It would be unjust to allow a defendant to lay by and take the chance of a verdict, and afterwards to come and set it aside upon an objection respecting which he had the means of knowledge. Besides, there is this circumstance, that he has actually approved of the jury, and consented to their trying the cause.

GURNEY and ROLFE, B.'s, concurred.

Rule discharged.

LLOYD, Administrator of EDWARD LLOYD v. MOSTYN.



6th of December 1808, bequeathed to the three children of S. Mostyn, the father of the defendant, the sum of 200*l*. to be equally divided between them when they should attain the age of twenty-one years, and had appointed the said Edward Lloyd executor. That in 1815, before any of the children attained that age, the executor, E. Lloyd, paid the money to their father, S. Mostyn, who, together with the defendant, his son, gave the present bond to indemnify E. Lloyd, his executors or administrators for the amount, and all costs respecting it. The declaration then averred, that after the children attained the age of twenty-one years, the plaintiff, on the 18th of June 1841, was, by reason of the said executor of E. Lloyd, having paid over the said sum of money to the said S. Mostyn, forced and obliged to pay P. Mostyn, one of the said three children, his share in the said sum of 200*l*., and the interest thereof, and the costs of a certain suit in Chancery therefore instituted by the said P. Mostyn against the plaintiff, as such administrator, for the recovery of his share of the said legacy, and the interest thereon; and was also forced and obliged to lay out and expend a further sum of 40*l*., in and about the plaintiff's defence to the suit, and about procuring the same to be discontinued, and assigned as a breach, that neither the defendant nor the said S. Mostyn had indemnified the plaintiff. Pleas, non est factum, and payment.

At the trial, before *Gurney, B.*, at the last Flint Summer Assizes, it appeared that the bond in question was in Court in the possession of one Williams, who had succeeded to the business of his father-in-law, Jones, who was deceased, and who in his lifetime acted as the attorney for the obligors, and amongst whose papers the bond was found after his decease. Williams, who now acted for the executrix of Jones, objected to produce the bond, on the ground that he stood in the same situation as Jones, who held the bond in the capacity of attorney for the defendant. The learned Judge allowed the objection, and the plaintiff then proposed to give secondary evidence of its contents, and

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tendered a copy of the bond. To render this evidence admissible, the plaintiff proved a notice to produce the original bond served on the defendant's attorney the day after the commission day, but on the day before the trial actually took place. It also appeared that Williams, in the progress of the suit, had sent the bond to the defendant's attorney, and that a copy was furnished to the opposite party under a Judge's order. It was objected that the copy was inadmissible, first, because the notice to produce the original was served too late; secondly, that as Williams was not bound to produce the bond on the ground of his client's privilege, a copy furnished by him could not be received. The learned Judge admitted the evidence. It also appeared, that the first application made to the plaintiff by the legatee for the payment of his legacy, was in December 1839, and a correspondence was carried on between them until the month of March following, when proceedings were commenced in the Court of Chancery, which were ultimately put an end to by the plaintiff paying the legacy, with interest and costs. On the part of the defendant, it was objected, that the plaintiff ought not to recover the amount of the costs incurred by the correspondence, or the proceedings in equity, as they were incurred by the plaintiff wrongfully resisting the payment of the legacy. A verdict was found for the full amount, the learned Judge having



the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel for the plaintiff offered in evidence a copy of the deed which had been obtained from one who had many years ago acted as attorney for the person under whom the defendant claimed, and who had been intrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney, and *Bayley, J.*, refused to admit it. He said "the attorney could not give parol evidence of the contents of the deed which had been intrusted to him, so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or a verbal communication. It is the privilege of his client from first to last." [*Parke, B.*—I have some doubt as to the correctness of that ruling. If the attorney communicates the contents of the document, or suffers a copy of it to be taken, surely secondary evidence so obtained would be admissible. Suppose the instrument was stolen, and a copy obtained in that way. A statement by an attorney of the contents of a document may, at least, be received as an admission by him.] Secondly, the notice was insufficient. Where the deed is one which the party may either fairly be presumed to have in his actual possession, or can immediately come at, notice given the night before the trial will do; but in other cases, the notice must be given within a reasonable time, *George v. Thompson (a)*. [*Parke, B.*—That does not apply to a case like this, in which the bond was actually lying on the table of the Court. Suppose, for instance, a person on whom such a notice has been served has not got the document in his possession, but it is put into his hands on his way to the Court, would he not be bound to produce it?] There are cases, from which it

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(a) *Ante*, vol. 4, p. 656, O. S.

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would appear, that if a notice to produce a document be not good when served, it cannot be rendered so by matter *ex post facto*. In *Cook v. Hearn*, (a) it was held that an attorney for the opposite party could not be asked whether he had with him a rule of Court relating to the cause, with a view to give secondary evidence of it, no notice to produce or subpoena duces tecum having been served. In *Bate v. Kinsey* (b), an attorney, who had received no notice, refused to produce a document, on the ground of his client's privilege, and parol evidence of its contents was held to be inadmissible: In that case, *Gurney, B.*, says, "the fact of the instrument being in Court makes no difference with regard to the necessity of a notice to produce." In *Doe v. Gray*, (c) it was held that service of notice on the wife of the defendant's attorney, at his lodgings, to produce a lease on the evening before the trial was insufficient.

Lord ABINGER, C. B.—I think, that under the circumstances of this case, the notice was given within a reasonable time. It appears that the defendant's attorney had at one time been in possession of the original bond, and must have known that Williams would be subpoenaed to produce it, and consequently, had ample time to consider whether or no it would be for his client's interest to produce it. This is, in short, a case where the party on whom

PARKE, B.—I am of the same opinion. The first question is, whether this notice to produce was sufficient. I concur in the principle laid down in the cases, which is, that reasonable time to produce a document must be given to the party called upon, and that the Judge is the proper person to decide whether a reasonable time has been allowed. In the present case, I think there was ample evidence to justify him in deciding that this notice was sufficient. The notice was given on the Thursday, the case is tried on the Friday, and from what had taken place in London, the defendant's attorney knew that the bond was in the possession of Williams, and that Williams would be subpoenaed to produce it at the trial, which amounts to this, that he knew the bond was in the possession of his client, for Williams had undertaken to produce it for him, so that the notice was sufficient, even on the principle that its sufficiency must be determined at the time of the service. I am not at all prepared to say, that if the attorney did not know of these facts at the time he received the notice, and if the bond had not been in Court, but had accidentally come into the possession of the attorney after he received the notice, he would not be bound to produce it. But it is not necessary for us to decide that point at present. In the cases which have been cited to support a contrary doctrine, there had either been no notice at all given before the trial, as in the case of *Cook v. Hearn*, where the notice was served while the trial was actually going on, and which, in fact, was no notice at all; or as in the case of *Doe v. Gray*, where it was served on the wife of the party, and not on his attorney, and there was no proof that the latter had ever received it. Those cases, therefore, are distinguishable from the present, inasmuch as here there was a notice to produce served; and the only question is, whether it was served a reasonable time before the trial? As to the question relative to the defendant's liability for the costs incurred by the plaintiff in defending the suit in

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Chancery, the case of *Duffield v. Scott* (a), is an authority to shew, that where a party gives a bond to indemnify against all liability in respect of a certain event, he is bound to see that the costs resulting from that event are paid. So that the defendant in this case, ought either to have paid the legacy, or when a suit was brought upon it, to have defended it himself. That being so, he is bound to make good the reasonable costs resulting to the party entitled to his indemnity, and there is no proof to satisfy us that more than those reasonable costs has been demanded from him on the present occasion.

GURNEY and ROLFE, B.'s, concurred.

Rule refused.

(a) 3 T. R. 374.

HEATH v. UNWIN.

In an action for the infringement of a patent, the defendant pleaded that the nature of the

THIS was an action for the infringement of a patent for certain improvements in the manufacture of iron and steel.

The defendant pleaded, first, not guilty; secondly, that the plaintiff was not the first or true inventor of the im-

vention; but on the contrary thereof, had been wholly and in part, publicly and generally practised and used, and vended within that part of the United Kingdom of Great Britain and Ireland, called England, before the date and grant of the letters patent; fifthly, that the defendant committed the supposed grievances, by the leave and license of plaintiff.

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The notice of objections delivered with the pleas, in pursuance of the 5 & 6 Wm. 4, c. 83, s. 5, was as follows:— The defendant in this action, besides denying that he has infringed the letters patent in the declaration mentioned, means, at the trial of this action, to rely also upon the following objections: that is to say, first, that the patentee was not the inventor of the improvements for which the patent is said to be in force; secondly, that the specification and disclaimer do not sufficiently describe the nature of the invention, and the manner in which it is to be performed; thirdly, that the invention does not produce the effect stated in the specification, nor is such effect produced by the plaintiff in the manner therein stated; fourthly, that the invention was not new, and was either wholly or in part used and made public, before obtaining the letters patent; fifthly, that it does not essentially differ from other similar inventions which were in public use, at or before the granting of the said letters patent; sixthly, that the defendant had the plaintiff's leave and license to make use of the improvements for which the letters patent were granted.

Ogle had obtained a rule for the delivery of further and better particulars of the objections intended to be relied on, against which

Martin shewed cause. The 5th section of the 5 & 6 Wm. 4, c. 83, enacts, "that in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any

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scire facias to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively, at such trial, unless he shall prove the objections stated in such notice." The object of that enactment was to communicate to the plaintiff the objections on which the defendant, bonâ fide intended to rely, in order that the plaintiff might proceed to trial, fully prepared to meet them. That object is amply attained by the present notice. It is no objection to these particulars that they are substantially the same as the pleas themselves. In *Neilson v. Harford* (a), Parke, B., in delivering the judgment of the Court, says, "The statute did not mean to say, nor did the Court of Common Pleas, in the cases which have been cited, mean to decide, that it would not be sufficient, in some cases, to give notice in the terms of the plea itself. The objection may be so completely and so fully expanded on the record, that a mere transcript of the plea itself may be sufficient; in other cases, the plea may be so general in its language, as to be insufficient, as a notice if transcribed from the plea merely. Each case must depend on its own peculiar circumstances."

Ogle, in support of the rule: The case of *Bulnois v.*



of the invention which were not new, and by whom they had been used. He also referred to *Webster on Patents*, 59.

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LORD ABINGER, C. B.—The fourth particular certainly falls within the case of *Fisher v. Hewitt*, but I see no objection to the rest. With respect to the second, it is surely enough to say that the specification does not properly set forth the invention.

PARKE, GURNEY, and ROLFE, B.'s, concurring, the rule was made absolute as regards the fourth objection, and discharged as to the others, the costs to be costs in the cause, and the plaintiff to furnish the defendant, at his expense, with a copy of the patent and specification.

STEWART, Public Officer, v. GREAVES and Others.

ASSUMPSIT for money lent, money paid, and money had and received, &c.

The defendants pleaded, secondly, that the causes of action accrued against a certain banking co-partnership, called, "The Southern District Banking Company," established under the 7 Geo. 4, c. 46, and not otherwise, of which said co-partnership the defendants, at the time of the causes of action, were members; that the said causes of action accrued against the defendants as such members,

To an action for money lent, the defendants pleaded that the cause of action accrued against a banking co-partnership, established under the 7 Geo. 4, c. 46, of which defendants were members, and are sued as such, that B.

and D. had been duly appointed and registered as public officers of the co-partnership, to sue and be sued on behalf of the same, and that the said persons so appointed and registered as such public officers at the commencement of the suit, were resident within the jurisdiction of the Court: *Held*, on special demurrer, first, that the plea was good, and that the individual members of the company were not liable to be sued, but that the remedy was against the company, by their public officer.

Secondly, that the plea was matter in bar, and not in abatement.

Thirdly, that the plea did not amount to an argumentative denial of the contract.

Fourthly, that it was no ground of objection that the plea did not "allege that B. and D., were public officers, whilst the company carried on business under the 7 Geo. 4, c. 46."

Fifthly, that it was no ground of objection that the plea did not state that the cause of action arose against the defendants in their character of bankers.

Sixthly, that it sufficiently appeared, that B. and D. were actually public officers, and not merely nominated as such.

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and not otherwise ; and that the defendants are sued in this action as such members, and not otherwise, in respect of the said causes of action, that one S. Bovill, and one W. Dunn, had been duly appointed and registered, pursuant to the said statute, as public officers of the said co-partnership, to sue and be sued for and on behalf of the same, according to the statute ; and the said persons so being, and being duly nominated and appointed and registered as such public officers, at the time of the commencement of this suit, were living and resident in England, and within the jurisdiction of this Court.

Thirdly, that the causes of action accrued against the said co-partnership, called, "The Southern District Banking Company," of which, at the time of the accruing of the causes of action, the defendants were jointly members with one J. W. Gilbart and J. A. Batho, and who, at the said time, were resident in England, and that the said causes of action accrued against the defendants jointly with the said J. W. Gilbart and the said J. A. Batho, and not against the said defendants alone : that the said J. W. Gilbart and J. A. Batho, before and at, &c., were, and from thence hitherto have been, and still are members and co-partners of and in the co-partnership in the declaration mentioned, called, "The East of England Bank," and that the plaintiff sues as such public officer of such

and that it does not traverse or confess and avoid the causes of action; fourthly, that it does not appear by the said plea that Bovill and Dunn ever were public officers of the said co-partnership, whilst the co-partnership were carrying on business under the said act; fifthly, that it does not appear by the said plea that the cause of action accrued against the co-partnership of persons, in respect of any matters connected with a trading, under the provisions of the said act; and that it is consistent with the allegations in the plea, that although the causes of action accrued against the said co-partnership of persons, yet that the causes of action against such persons accrued in respect of matters wholly unconnected with the business of banking, or any trading or business contemplated by the said act; sixthly, that the plea does not expressly aver that Bovill and Dunn were, at the time of the commencement of the suit, public officers of the co-partnership; but it is consistent with it, that they might have been public officers of the co-partnership, but had ceased to be such.

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Special demurrer to the third plea, assigning for cause, that although Gilbert and Batho were members of the co-partnership mentioned in the plea, yet that plea did not shew any grounds for absolving the defendants from liability.

Butt, in support of the demurrer. The 7 Geo. 4, c. 46, has not taken away the common law right of suing the members of the copartnership, but merely gives an additional remedy. The words of that act are affirmative, and do not, therefore, abrogate the common law. *Dwarris on Statutes*, 637. *Com. Dig.* tit. "*Parliament.*" 1 *Black. Com.* 89. In 2 *Inst.* 200, it is laid down, that, "it is a maxim of the common law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law." This is an enabling, not a disabling statute. Statutes ought not to be construed as taking away the common law right, unless

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their language is extremely clear. Where a statute empowered justices to stop up a footway, and required that a form set out in the schedule should be used on all occasions, the Court held the words of the act peremptory, but there, the act did not use the words shall and may. *Davison v. Gill* (a). In *Blewitt v. Gordon* (b), which was an action against a member of a joint stock company, authorized to sue and be sued in the name of the secretary or one of the directors, as the nominal plaintiff or defendant, *Coleridge, J.*, was of opinion, that it was not imperative on the plaintiff to sue the nominal defendant. In *Manners v. Rowley* (c), the Vice Chancellor decided that a joint stock banking company, under the 7 Geo. 4, c. 46, might sue by their public officer, members of the company jointly with strangers. Suppose the company had not appointed any public officer, or if the public officer should happen to be out of the jurisdiction, there would be no means of recovering the debt. Secondly, the plea only shews matter in abatement. The object of it is to give a better writ; for it does not allege that the defendants did not contract, but only that the action ought to be brought against them through their public officer. Thirdly, the plea amounts to the general issue. Assuming the common law remedy to have been abrogated, the plea is an argumentative denial of the existence of the causes of action

states that the persons named were registered as public officers, but it does not allege that they were so in fact at the time of action brought; they might have ceased to be public officers. The third plea is clearly bad, as one banking co-partnership may sue another, although composed of individuals who are members of both co-partnerships.

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Ogle, contra, admitted, that he could not support the third plea. The second plea is good under the ninth section of the 7 Geo. 4, c. 46, actions must be brought against the public officer of the co-partnership, and not against the individual members. The words in that section that "all actions shall and lawfully may be brought against the public officer," have a compulsory meaning. The plaintiff, in suing by their public officer, are availing themselves of a provision in the statute, and the question is, whether they can pursue the statutory remedy in part, and partly proceed at common law? Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. *Bac. Abr.* tit. "*Statute*," (I) 5. The 8 & 9 Wm. 3, c. 11, which enacts, "that plaintiffs may assign or suggest breaches on bonds," has been construed as compulsory. *Hardy v. Bern* (a), *Roles v. Rosewell* (b), *Gainsford v. Griffith* (c). The decisions in *Cates v. Knight* (d), *Crisp v. Bunbury* (e), *The Dundalk Western Railway Company v. Tapster* (f), will assist the Court in putting a construction on this statute. The title of the statute shews that the first object of the Legislature was, the better regulation of banking co-partnerships. The 4th section provides, that such co-partnerships shall, before issuing bills or borrowing money, &c., deliver at the Stamp Office an account, setting forth the names and places of abode of its members; and the 18th section imposes on

(a) 5 T. R. 636.

(b) 5 T. R. 538.

(c) 1 Wms. Saund. 51.

(d) 3 T. R. 442.

(e) 8 Bing. 394.

(f) 1 G. & Dav. 657.

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the co-partnership a penalty for omitting to do so; but, according to the argument on the other side, each individual member would be liable to be sued for that penalty. The 10th section enacts, that no person having a demand against the co-partnership shall bring more than one action in respect of such demand; "and the proceedings in any action or suit by or against any one of the public officers nominated as aforesaid for the time being, of any such copartnership, may be pleaded in bar of any other action or suit for the same demand, by or against any other of the public officers of such co-partnership." By the 12th section, judgments against the public officer are to operate against the property of the co-partnership. That section shews, that the partnership property was, in the first instance, to be liable, which could not be the case, unless it is compulsory to sue the public officer. [*Alderson, B.*—The 14th section provides, "that every public officer in whose name any suit or action shall have been commenced, prosecuted and defended, and every person or persons, against whom execution upon any judgment obtained or entered up as aforesaid, in any such action, shall be issued as aforesaid, shall always be reimbursed and fully indemnified for all loss, damages, costs, and charges without deduction, which any such officer or person may have incurred by reason of such

Wilson v. Craven (a), and *Ex parte Wood* (b), are also in point. As to the other objection, this is not a plea in abatement; the substance of it is, that inasmuch as the plaintiff has not proceeded according to the statute, the defendant is not liable at all. In *The Dundalk Western Railway Company v. Tapster*, a similar plea was held to contain matter in bar.

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Butt replied.

Montague Smith was heard in support of similar pleas of one of the defendants, who had pleaded separately.

Cur. adv. vult.

The judgment of the Court was delivered by

PARKE, B.—This was an action brought by the plaintiff as the public registered officer of a co-partnership united for the purpose of carrying on the trade and business of bankers in England under the 7 Geo. 4, c. 46, against Thomas Greaves and several others. (His Lordship then stated the pleadings.) Six objections were made on the argument of the demurrer to the second plea, one of substance, and the others of a formal nature. The principal objection was, that in the case of a company established and carrying on business under the provisions of the statute 7 Geo. 4, c. 46, the individual members of it are liable to be sued on the contracts of the company as they would have been but for that statute, which, it is argued, gave an additional or cumulative, not an exclusive remedy against the company by an action against its public officer. This question, on account of its importance, the Court took time to consider. We have considered it, and are all of opinion that the creditors of a company so established, and having a public officer, have no remedy against

(a) 8 M. & W. 584.

v. (b) 1 Mont. Dea. & De Gex. 92.

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the individual members at common law, and we are of that opinion, on the words of the 9th section giving the remedy against the public officer, and upon the whole purview of the statute. The words of the section are, "that all actions against the co-partnership shall and lawfully may be commenced, instituted and prosecuted against one or more of the public officers enumerated as before mentioned," the nominal defendants. These words, according to their ordinary import, are obligatory, and ought to have that construction, unless such construction would lead to some absurd and inconvenient consequence, or would be at variance with the intention to be collected from the other parts of the act. This construction is manifestly reasonable; it is consistent with the context, and in accordance with the intent of the framers of the act to be collected from every part of it. It is clear, from the recital of the act, and the scope of most of its provisions, that the Legislature intended to give to corporations, and to co-partnerships of more than six within the limits therein mentioned, the power of being banks of issue, the Bank of England waving its exclusive privilege in their favour, the condition being that the individuals should be liable for the bills and notes issued, or money borrowed by such corporations or companies in the qualified manner pointed out by the act. This liability by the common law would

wards, those who were so at the time of the contract being entered into or carried into effect, or when the judgment was obtained thereon. In a proceeding against individuals, they would be liable to simple contract debts for six years, for specialty for twenty. By the statutory mode of proceeding, the members who had ceased to be such for three years are exempt from debts of every description. Thus the liability created by the statute is very different from that which would exist without it, and it cannot be supposed that the Legislature meant to leave it to the option of any creditor whether the members of the company should be subject to one species of liability or the other; still less that the creditor should have the power of depriving them of the statutory protection, which is given to each after having ceased for three years to be a partner. The framers of the act had in view the convenience of the public, and, therefore, provided a more convenient remedy for creditors than at common law. But they had also in view the benefit of the members of the company, by restricting their personal liability. All the clauses of the statute are consistent with this view, and there is one section which seems to show that the Legislature did not contemplate that an action would lie for the same debt against the individual member as against the nominal defendant; for it provides, that if the merits have been tried in an action against one public officer, the proceeding may be pleaded in bar to another action against another public officer, and it does not make a similar provision if the merits have been decided against the individual member. It was objected at the Bar, that the creditor must at all events be entitled to sue the individual members if there should be no public officer, or if the public officer should happen to be out of the jurisdiction so as not to be capable of being sued with process; and that if he must have the remedy in such case, he would be at liberty to have recourse to it in all cases. If it should be conceded that in those special cases it would

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be competent for a creditor to sue the members as at common law from the necessity of the case, to avoid a failure of justice, it would by no means follow that he would have the right to do so when the necessity did not exist, and there was, as there is in the present case, an officer, and that officer a resident within the jurisdiction. Whether even in such a case an action would lie against the individual members, it is not necessary to decide on the present occasion. There is strong ground to contend the Legislature meant that there should always be a public officer capable of being sued, and that the company are compellable by law to appoint one. The case of *Blewitt v. Gordon*, before my brother *Coleridge*, was cited as an authority that the creditor had an option to sue a company constituted as this is by all its individual members. The act under which the company mentioned in that case was constituted is very different from the present, and the words "shall and lawfully may" were held by the Court not to be obligatory. We are of opinion, therefore, that this act of Parliament meant to give one remedy only, and that against the company in the name of its public officer, and that the common law remedy is taken away at least when such officer exists, and is in England, consequently, that the second plea is good in substance. It remains for us to consider the other five objections, all of a formal

on its business as bankers, by issuing notes, &c. The answer is, that the statute does not require the appointment to be made during that time. It may be made, and indeed ought to be made in the first instance before they issue notes at all. Fifthly, it is objected that the third plea does not state that the cause of action arose against the defendants in their character as bankers, the same answer may be given as to the fourth objection. The statute does not require it. If they are bankers under the provisions of the act, they may sue and be sued on any contract entered into by the partnership, and if this objection were well founded, the declaration would be bad. The sixth objection is, that there is no averment that the two persons named actually were public officers, but only that they had been nominated, and were registered as such. We have had some doubt on this point of mere form, but we think that there is a positive averment that they were; the plea concludes by averring that they so being, and being duly nominated public officers as aforesaid, were living and resident in England, and within the jurisdiction of this Court at the commencement of the suit. The result is, that the defendant is entitled to our judgment on the second plea.

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Judgment accordingly.

ACRAMAN v. COOPER and Others.

TROVER. The declaration stated that the plaintiff was lawfully possessed, as of his own property, of certain goods and chattels, to wit, two receipts each of the said receipts purporting to be a receipt for 10,500*l.*, being 35*l.*

To trover for scrip receipts, the defendant pleaded that before and at the said time, when, &c., he was possessed

of the same receipts, and being so possessed, before the same time, when, &c., delivered them to J. D., to be kept by him for the defendants' use, that J. D., before the said time, when, &c., delivered them to the plaintiff, who lost them out of his possession, and they came to the possession of the defendants, that defendants refused, at the request of the plaintiff, to deliver them to him as they lawfully might, *quæ est eadem*.

Held, bad for duplicity, and for not confessing the conversion complained of.

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per share on three hundred shares of 100*l.* each, in the capital stock of a company known as the Royal Mail Steam Packet Company, and two scrip receipts relating to money paid on shares of the said company, and two other scrip receipts, and two other pieces of paper of great value, to wit, of the value of 20,000*l.*, and being so possessed, the plaintiff afterwards to wit, &c., lost the said goods and chattels out of his possession; the same came to the possession of the defendants by finding. Yet the defendants, well knowing the said goods and chattels to be the property of the plaintiff, &c., converted them to their own use.

Plea. That before and at the said time when, &c. the defendants were lawfully possessed as of their own property of two receipts, and of two scrip receipts which are the same two receipts, and two scrip receipts in the declaration mentioned, and being so possessed, the defendants afterwards, and before the said time when, &c., delivered the same to one John Doe, to be kept by him, the said John Doe to and for the use of the defendants; that the said John Doe, afterwards, and before the said time when, &c., delivered the same two receipts, and two scrip receipts to the plaintiff; that afterwards, and before the said time when, &c., the plaintiff casually lost the same two receipts, and two scrip receipts out of his possession, and

plea impliedly or argumentatively denied, the plea is wrongly concluded with a verification. Also, that the plea amounts to the general issue; also, that the plea neither confesses nor shews any title or colour of title in the plaintiff at the time of the conversion in the plea pretended to be confessed; also, that at the time of the conversion charged, it does not appear by the plea that the plaintiff had either any actual or constructive possession or right of possession or property or colour of title whatsoever; also, that the plea is argumentative in this, that it states facts which, if true, shew that the plaintiff at the said time when, &c., was not possessed as of his own property of the receipts and scrip receipts in the declaration mentioned. That the plea is also argumentative in this, that it states facts which are only evidence of a conversion of the said receipts and scrip receipts, and which facts, even if true, do not shew or confess any such conversion, but on the contrary, shew that there was no such conversion; also, that the plea is double, inasmuch as, if true, it not only shews that at the said time when, &c., the plaintiff was not possessed as of his own property of the said receipts and scrip receipts, or any part thereof, but also shews that the defendants were not guilty of the grievances in the declaration mentioned; also, that the plea shews a state of facts contrary to the state of facts disclosed by the declaration, and therefore, according to the rules of pleading, ought to have concluded with a traverse of the allegations in the declaration or some of them.

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Kelly, in support of the demurrer. The plea professes to give colour, but in substance it amounts to an argumentative denial of the plaintiff's title. The declaration alleges that the plaintiff was lawfully possessed as of his own property of certain goods and chattels, to wit, two receipts. That allegation is admitted by the plea, which

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states that before and at the time of the conversion, the defendants were possessed; and then, by way of giving colour, alleges that the defendants delivered the receipts to John Doe, to be kept by him for their use, and that he afterwards and before the said time when, &c., delivered the same to the plaintiff. The rules of pleading require that where colour is given, a possessory title should appear in the plaintiff at the time of the conversion. But in the present case, no such title is shewn, for the plea states that before the conversion the plaintiff casually lost the receipts out of his possession. The plaintiff's right to the possession was created by the delivery of the receipts to him by John Doe, but when the plaintiff lost the receipts out of his possession, his title ceased. The plea shews that at the time of the conversion, the plaintiff had neither the actual possession, nor the right of possession. In *Com. Dig.* tit. "*Pleader*," (3 M.) it is said, "if a defendant pleads false matter, the colourable title must exist at the time of the conversion." *Morant v. Sign (a)*, will perhaps be cited on the other side; but there, the plea shewed an actual possession by the plaintiff at the time of the conversion. In *Stephen on Pleading (b)*, it is said, "that a mere possession without some show of title is insufficient in law to give a colourable right against the true owner." The plea is also double, inasmuch as it denies the plain-

no distinction between express and implied colour. In *Rockwood v. Feasar* (a), which was an action of trover, the defendant pleaded, "that long before the conversion supposed to be, J. S. was possessed of the goods as of his own goods at B., in Norfolk, and that he, before the conversion supposed, did casually lose them, and they came to the hand of J. Palmer by trover, who gave them to the plaintiff, who lost them in London, and the defendant found them, and afterwards did convert them to his own use by the command of the said J. S. as it was lawful for him to do, and it was moved that this is no plea, for it amounts to the general issue; but all the justices held it a good plea, for it confesseth the possession and property in the plaintiff against all but the lawful owner." A note is appended, stating that "the plea was devised by Coke to alter the trial." That case precisely resembles the present. The plea shews that the plaintiff was possessed before he lost the goods. *Kynnersley v. Barnard* (b), was a case of "trover for a horse, and selling him, and converting the money to his own use; the defendant confesseth that it was the plaintiff's horse, and that one J. found and delivered him to the defendant to restore upon request, whereupon he re-delivered him to the said J. C. before the action brought, absque hoc, that he sold him, and converted the money to his proper use, and it was thereupon demurred, because he ought to have pleaded the general issue, and he could not traverse the conversion. But all the Court held, although it be doubted in the Books 27 Hen. 2, 33 Hen. 8, 4 Edw. 6, *Bro. action sur le case*, and *Dy. 121*, "yet, forasmuch as in this action the substance is the conversion, and without it the action cannot be founded, it might well be traversed. But in regard that he hath traversed the conversion of the money to his own use, which is not materially alleged in the declaration, but is superfluous, and by his traverse hath made it to be part

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(a) Cro. Eliz. 262.

(b) Cro. Eliz. 554.

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of the issue, the traverse, therefore, is ill in that point. And the demurrer being upon the traverse, it was found for the plaintiff." In *Holler v. Bush (a)*, which was an action of trespass, the defendant pleaded that the horse in question was the horse of J. S., and that the plaintiff took and impounded it, and the defendant took him by replevin, &c., and the Court held, "that this plea was no more than the general issue, for it does not excuse or admit a possession, for the taking and impounding gave no possession to the plaintiff, but the horse was thereby only in the custody of the law, and so no colour of action in the plaintiff; otherwise, perhaps, it had been non cepit et detinuit." That case was decided on special grounds, and though in the case of *Morant v. Sign*, there is an allegation that the defendant took the goods out of the possession of the plaintiff, yet a statement of a demand and refusal would have been sufficient. There, to trover for an oak tree, the defendant pleads that he was seised in fee of a close, and being so seised, he cut down the tree, which he afterwards delivered to Richard Roe, to be kept for the use of him, the defendant, and that the said Richard Roe afterwards delivered it to the plaintiff, whereupon the defendant took it out of the possession of the plaintiff as he lawfully might, for the cause aforesaid, which is the same conversion in the declaration mentioned, and this Court

There may be a conversion though no property. This is a special plea of not possessed. A plea in confession and avoidance is good, though the matter may be given in evidence under the general issue. *Com. Dig.* tit. "Pleader" (E 14).

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Kelly, in reply. In *Morant v. Sign*, it appeared that the plaintiff had a property in the goods, but this plea shews that at the time of the conversion, right of possession was in the defendant. The cases cited from *Croke Elizabeth*, were decided on other and different grounds. It does not appear from the report, in what form the case of *Rockwood v. Feasar* came before the Court; if it had been on demurrer, the plea might have been held bad. [*Parke*, B.—It must have been decided on demurrer.] It might have been on motion, or on general demurrer, in which case, the plea would be good, the question being, whether the plea amounted to the general issue? *Ward v. Blunt* (a) was an action of trover, and the defendant pleaded, "that before the trover, he was seised of certain land in Burton, in the county of Stafford, in fee, and the corn and hay was growing upon that land, and he cut them as his proper goods, and was of them possessed until he lost them, and they came to the hands of the plaintiff by trover, and he lost them again, and they came to the hands of the defendant, and he converted as it was lawful for him to do. *Egerton* then moved that the plea amounted to the general issue, for it is no more than that they were his proper goods, and then he ought to plead non culp., and if it be a plea, he ought to traverse, without that they were the goods of the plaintiff, for the plaintiff declareth that they were his proper goods, and he ought to answer it. *Atkinson* contra, although this plea amounts but to a general issue, yet he should not have demurred, but ought to have moved the Court that he should plead another plea, or a nil dicit be entered for

(a) Cro. Eliz. 146.

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demurrer being joined upon it, this is confessed, and then it is to be adjudged for the defendant: but the Court held, that inasmuch as this was the special cause shewn upon the demurrer, it is good, and then shall be adjudged for the plaintiff, and afterwards the plaintiff had judgment." As to the other point, the plea is clearly double. The substance of it is, that the goods are not the property of the plaintiff, and, therefore, the defendant converted them. In *Manchester v. Vale*, where the defendant justified the trespass with cattle, but did not confess, it was held, that the plea being bad in part, although it justified some part well, was bad for the whole.

Lord ABINGER, C. B.—When a case comes before us on demurrer, and the Court, without hearing counsel on both sides, entertain an opinion which induces them to recommend one of the parties to amend, in which his counsel acquiesces, I should be glad if such cases were not reported, because the matter is terminated by the discretion of the counsel, and there is no solemn judgment of the Court. At the same time, I do not mean to question the authority of *Morant v. Sign*, though it is open to observation; that *Ward v. Blunt* was not cited in the argument, and the particular ground now taken, that the plea ought to confess a possession at the time the conversion took place, was not

stating that the ground of complaint was not a conversion, but a demand and refusal, which is only evidence of a conversion.

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PARKE, B.—I am of the same opinion. It is argued that the plea gives proper colour to the plaintiff, but in order to be a good plea, it ought to amount to a confession of the matter charged. Colour gets rid of the objection that the plea amounts to the general issue, but then the plea ought to be good by way of confession. This plea is not so, because there is no confession of the conversion. *Morant v. Sign* is certainly not of the same authority as if it had been fully argued; but I have no doubt as to that case, so far as I am concerned. The present case, however, is different, because, in the first place, there is no admission of a conversion, and more especially because the matter alleged as the conversion complained of, does not amount to a conversion, but is only evidence of it.

GURNEY and ROLFE, B.'s, concurred.

Judgment for the Plaintiff.

CHRISTIE v. RICHARDSON.

O'MALLEY moved for a rule nisi to review the taxation of the defendant's costs. The case was tried by a special jury granted on the application of the defendant, and the verdict was found for him. No application was made at the trial to the Judge to certify that the cause was proper to be tried by a special jury, but on the taxation of costs, a certificate of the Judge was produced, and the Master allowed the defendant the costs of the special jury. It did not appear at what time this certificate was given. The 6 Geo. 4, c. 50, s. 34, enacts, that the party who

The words in the Special Jury Act, 6 Geo. 4, c. 50, s. 34, requiring the Judge's certificate, "immediately after verdict," mean that the Judge shall certify within a reasonable time after it is pronounced.

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shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same upon taxation of costs than for a common jury, "unless the Judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." In *Waggett v. Shaw* (a), which was a decision on the 24 Geo. 2, c. 18, the words of which were similar, Lord *Ellenborough* held that a Judge could not certify for the costs of a special jury on the day after the trial. It is true, that in construing the 3 & 4 Vict. c. 24, s. 2, (which enacts, that where in certain actions the plaintiff shall recover less than 40s. damages, he shall obtain no more costs unless the Judge shall immediately afterwards certify that the action was brought to try a right,) the Courts have held that it is competent for the Judge to grant the certificate within a reasonable time after the trial, *Thompson v. Gibson* (b), *Page v. Pearce* (c), and the only question is, whether those cases must be considered as impliedly overruling *Waggett v. Shaw*?

Per CURIAM (d).—We think that similar words ought to be construed in a similar manner, and as the language of

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HAWLEY v. CADBURY.

ASSUMPSIT for money had and received to plaintiff's use. Plea, non assumpsit.

At the trial before the Secondary of London, it appeared that the plaintiff, defendant, and others, were creditors of one Sollengei, who carried on the business of a grocer, and who being in insolvent circumstances, had assigned his stock in trade and certain fixtures to the defendant, who was either to carry on the business for the benefit of the creditors, or dispose of it and divide the proceeds amongst them. The business proving inadequate to defray its expenses, the defendant sold it, and realised sufficient to pay 2*s.* 6*d.* in the pound upon the gross amount of the debts. The defendant had promised to pay the plaintiff his proportion, but had failed to do so. On behalf of the plaintiff, Sollengei was called as a witness, and objected to on the ground of interest. The Secondary overruled the objection, and the plaintiff obtained a verdict.

S. being in insolvent circumstances, assigned his property to the defendant for the benefit of the plaintiff, and other creditors. The property realised 2*s.* 6*d.* in the pound, which the defendant promised to pay the plaintiff: *Held*, that S. was a competent witness for the plaintiff in an action to recover the amount.

Willes moved for a new trial. Sollengei was an incompetent witness, inasmuch as he had a direct interest in the event of the suit; for, if the plaintiff succeeded, Sollengei would be discharged pro tanto from his liability to the plaintiff. *Walker v. Rostron* (a), shews the principle upon which an appropriation of payments rests, and that principle applies here, for the defendant having agreed to pay the plaintiff his share of the money, Sollengei could not in any event recover it back from the defendant. [Lord Abinger, C. B.—Suppose A. being indebted to B., pays money to a banker to pay over, may not B. sue the banker, and call A. as a witness?] Not if the banker has entered into a binding agreement to pay B. [Lord Abinger, C. B.—Sollengei is called to prove the engagement which the

(a) 9 M. & W. 411.

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defendant made with him; if he proves it, the plaintiff succeeds, if he fails, the defendant remains liable to Sollengei. *Parke, B.*—The promise by the defendant to pay the dividend to the plaintiff, amounts to nothing, unless he shews funds in the defendant's hands for that purpose. Sollengei is called to prove that fact, but his failure to do so does not affect his right against the defendant.] The result of the action affects his liability by diminishing his debt to the plaintiff in case the latter succeeds. Besides, the promise by the defendant to pay the plaintiff creates a new liability on the part of the defendant, and discharges the former liability to pay Sollengei.

Lord ABINGER, C. B.—We think there should be no rule.

Rule refused.

HUMBLESTONE v. DUBOIS.

A cognizance for double rent, under the 11 Geo. 2, c. 19, s. 18, should show the terms of the tenancy, and that a sub-

REPLEVIN for goods taken in a certain dwelling-house. Cognizance by defendant as bailiff of one T. Wright, alleging a seisin in fee of the locus in quo of the Marquis of Westminster, a lease by him granted to J. Thompson, and an assignment thereof by him to G. Wright, and a

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and before the said time when, &c., entered into and upon the said rooms and apartments, so being in and parcel of the said dwelling-house, in which, &c., with the appurtenances, and became and was possessed thereof, and being so thereof possessed, afterwards and before the said time when, &c., to wit, on the 24th day of June, A.D. 1841, she, the plaintiff, then having the power to determine the said tenancy, by giving such notice to quit as hereinafter mentioned, gave to the said T. Wright notice that she, the plaintiff, would quit and deliver up possession of the said rooms and apartments, so by her holden as aforesaid, on the 29th day of September, in the year aforesaid. And the defendant further saith, that the plaintiff did not, nor would, on the day and year last aforesaid, quit or deliver up possession of the said rooms and apartments, according to the said notice, but then refused so to do, and on the contrary thereof, without the consent of the said T. Wright, held over and continued possession of the said rooms and apartments, from the day and year last aforesaid, until and at the said time when, &c., although the said T. Wright, for and during all that time, was entitled to the possession thereof from the plaintiff, whereby the plaintiff then became liable to pay to the said T. Wright, during the time the plaintiff continued in possession of the said rooms and apartments, after the said 29th day of September in the year aforesaid, the quarterly rent of 12*l.* 10*s.*, being at the rate of double the rent or sum which the plaintiff would otherwise have paid, in case the said notice had not been so given.

Special demurrer, assigning for cause, that it is not shewn with sufficient certainty how the plaintiff had the power of determining her tenancy by such notice as she is stated in the said cognizance to have given.

Atherton, in support of the demurrer. The cognizance is founded on a claim to double rent, under the 11 Geo. 2, c. 19, s. 18, which enacts, "that in case any tenant or


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tenants shall give notice of his or their intention to quit the premises by him or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she or they would otherwise have paid." The statute contemplates a tenancy determinable by notice to quit, and that a proper notice has been given. Both those facts should appear on the face of the cognizance, in order that the plaintiff may have an opportunity of traversing them. The allegation that the plaintiff "had power" to determine the tenancy, involves two questions of fact and one of law. The power to determine the tenancy would depend upon its terms, and the terms of the notice, and then a question might arise as to the sufficiency of the notice in point of law.

The Court called on

Gurney, in support of the cognizance. It sufficiently appears that a quarter's notice was given.

ALDERSON, B.—The 24th day of June is laid under a videlicet: it means only that a notice was given to quit at



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WILLIAMS v. MORTIMER.

THE Court not having had time to hear the motions for new trials within the first four days of Term, this case, amongst others was entered on a list, and on the 9th of November,

An affidavit in support of a rule nisi, for a new trial, must be sworn within the first four days of Term, although the Court are not able to hear the motion until after that Term.

V. Williams obtained a rule nisi herein, which was drawn up on reading certain affidavits.

Chilton, on shewing cause, objected, that one of the affidavits was sworn after the first four days of Term, viz, on the 7th of November.

The Court held the objection valid, and that the rule could not be supported on that affidavit.

WILLIAMS, Executor, &c. v. WILLIAMS.

THE replication in this case having been amended (a),

Atherton obtained a rule, calling on the defendant to shew cause, why the plaintiff should not be at liberty to amend the second and subsequent writs issued in this cause, during the life of the plaintiff's testator, by adding to the memorandum already indorsed on each of such writs, a statement of the day of the date of the return; and why the entries of the said writs on the roll should not be amended so as to correspond with such amended writs, and also by stating the appearances of the plaintiff's testator as appearances by the attorney only.

The Court allowed the memorandum and appearance required by the 2 Wm. 4, c. 39, s. 10, to prevent the operation of the Statute of Limitations to be amended, and the roll made conformable to it, after an amendment on demurrer to a replication to a plea of the Statute of Limitations.

Jervis shewed cause. The object of this application is to make the writs correspond with the amended replica-

(a) See the case, *ante*, p. 209.

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tion. There are two cases only in which the Court will amend statutable writs; the one is, where the error arises from the misprision of the clerk, and the other where the remedy would be barred by the Statute of Limitations, if no amendment were made. [*Parke, B.*—It was certainly the practice before the Uniformity of Process Act, to make such amendments. Can the effect of the statute be to compel a plaintiff to go on against a party who cannot pay costs, or else be barred of his remedy?] The 10th section of the Uniformity of Process Act, (2 Wm. 4, c. 39,) enacts, “that no writ issued by authority of that act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration

given to amend the replication, it is requisite to alter the writs and make them conformable thereto. The statute has not altered the practice in that respect, but only so far as it requires the writs to be returned and entered of record, and the continuing writs to be entered within a month after their expiration. In *Lakin v. Watson* (a), the Court allowed a writ of summons to be amended by inserting the name of a co-executrix as a co-plaintiff, on the ground that the right of action would otherwise have been lost by the Statute of Limitations. And where, in an action for damage by rioters, a plaintiff, by mistake, had proceeded against the inhabitants of the hundred instead of the borough, the Court amended the writ and subsequent proceedings, by striking out the word "hundred," and substituting the word borough, the time for bringing a fresh action having expired. *Horton v. The Inhabitants of Stamford* (b). In *Bilton v. Clapperton* (c), the Court amended a writ of capias, so as to make it correspond with the affidavit to hold to bail. In *Eccles v. Cole* (d), the statement of the cause of action was altered from "debt" to "promises," although more than four months had elapsed from the date of the writ. And in *Kirk v. Dolby* (e), the Court decided, on consideration, that a writ of summons might be amended to render it conformable to the præcipe on which it was founded.

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PER CURIAM.—The rule must be absolute for the amendment, on payment of the costs of the amendment, and of this application.

Rule absolute accordingly.

(a) 2 C. & M. 685.

(b) 1 C. & M. 773.

(c) *Ante*, vol. 1, p. 386, N. S. ;
9 M. & W. 473.

(d) *Ante*, vol. 1, p. 34, N. S. ;
8 M. & W. 537.

(e) *Ante*, vol. 8, p. 766, O. S. ;
6 M. & W. 636.



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LEVY v. MAGNAY.

A sheriff being defendant in an action for the recovery of a sum under 20*l.*, the plaintiff took out a summons to try the cause before the coroner, which was opposed on the ground that the Judge had no jurisdiction so to order. After notice of trial, the defendant applied for leave to withdraw his plea, on payment of debt and costs, and an order was made accordingly: *Held*, that the plaintiff was entitled to costs on the lower scale only.

THIS was an action of debt against the Sheriff of Middlesex for the recovery of a sum under 20*l.* The defendant pleaded *nunquam indebitatus*, upon which issue was joined. A summons was taken out to try the cause before the Coroner of Middlesex, which was attended by both parties, when it was objected on the part of the defendant that the 3 & 4 Wm. 4, c. 42, s. 17 (*a*), did not empower a Judge to send a case to be tried by the coroner. The summons was, in consequence, dismissed. Proposals were then made by the plaintiff to try before the Judge of the Palace Court, or to change the venue, to neither of which would the defendant consent. Notice of trial was given for the sittings in Middlesex, and three days before the sittings, the defendant obtained a summons to withdraw his plea upon payment of the debt and costs. The Master having taxed the plaintiff his costs on the higher scale,

Kennedy moved for a rule to shew cause why the Master should not review his taxation. The Reg. Gen., H. T.,

(*a*) Enacts, "That in any ac- county where the action is
tion depending in any of the said brought, or any Judge of any

4 Wm. 4, orders, "that in all actions of assumpsit, debt or covenant, where the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* without costs, the plaintiff's costs shall be taxed according to the reduced scale: Provided, that in case of trial before a Judge in one of the superior courts or Judge of assize, if the Judge shall certify on the postea that the cause was proper to be tried before him, and not before a sheriff or Judge of an inferior court, the costs shall be taxed upon the usual scale."

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Martin shewed cause, and contended that the above rule applied only to cases in which either the full amount sought to be recovered is paid into Court, or where the plaintiff agrees to accept a less sum in lieu of his claim; but did not extend to the present case, which was a mere acquiescence in the plaintiff's demand.

Kennedy, in support of the rule, referred to *Cook v. Hunt (a)*, where, in an action for unliquidated damages, an order having been made for staying proceedings upon payment of a sum under 20*l.*, and costs to be taxed, it was held that the plaintiff was entitled to costs upon the lower scale only.

LORD ABINGER, C. B.—The rule must be absolute. Every case of money paid by arrangement is within the rule of Court.

ALDERSON, B.—If we were merely to look at the case in an equitable view, there could be no doubt that the plaintiff ought to have his costs taxed on the higher scale, but the question is, whether he has not precluded himself by the course he has taken? If we were to enter into the

(a) *Ante*, vol. 7, p. 397, O. S.; 5 M. & W. 161.

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merits of cases of this kind, the Master could not exercise his discretion, but would be obliged to tax with a knowledge that his allowance would be reviewed by the Court, which would render taxation endless. The intention of the rule was, that where defendants were driven to try at Nisi Prius in a case involving an amount under 20*l*., the costs of the plaintiff should be taxed on the lower scale, on the ground that he ought to have had recourse to a cheaper mode of trial. In this case he has attempted to do so, but was prevented by the defendant, who afterwards alters his mind and applies for leave to withdraw his plea. That could only have been done upon such terms as the Judge should think fit to impose, so that in making this rule absolute, we shall not cause any evil for the future, as the plaintiff, in a similar case, will only have to request the Judge not to discontinue the action except upon the terms that the costs shall be taxed on the higher scale. When the Judge makes the order he will take all the circumstances into consideration, but where there is no direction as to costs it is better to adhere to the general rule, though it may be hard in the present case.

GURNEY, B., concurred.

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April, 1841, drawn by the plaintiff upon and accepted by the defendant, for payment of 20*l.* three months after date. There was also a count on an account stated.

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The defendant pleaded payment into Court of the sum of 20*l.* 18*s.*, and that the plaintiff had not sustained damages to a greater amount in respect of the several causes of action in the declaration mentioned.

The plaintiff replied damages *ultra*, upon which issue was joined.

At the trial, before Lord *Abinger*, C. B., the plaintiff merely put in and proved the bills, upon which the defendant proposed to shew that he had originally accepted a similar bill on the 9th of July, 1840, as an accommodation to certain persons who were indebted to the plaintiff, that the bill set out in the first count of the declaration was given as a renewal of that bill, and that on the 1st of February, 1841, the parties for whose accommodation the original bill had been given paid it, but omitted to take away the bill, or give notice of its payment to the defendant, and that he in ignorance, and without consulting them, gave the bill set out in the second count as another renewal. The learned Judge held the evidence inadmissible on these pleadings, and a verdict was found for the plaintiff.

Crowder had obtained a rule *nisi* to set aside the verdict, and for a new trial, against which

Jervis shewed cause. The object of the defendant was to prove that the bill set out on the second count of the declaration was in effect a payment of the bill mentioned in the first count. But such evidence was clearly inadmissible on these pleadings. The plea confesses the cause of action, but affords an answer to part of it only. To a count on a bill of exchange or promissory note, a defendant cannot pay into court a smaller sum than the amount of the bill, *Armfield v. Burgin* (a). A good plea might be

(a) *Ante*, vol. 8, p. 247, O. S.; 6 M. & W. 281.

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framed on the facts, and it is an established rule that a defendant cannot give in evidence in mitigation of damages circumstances which, if pleaded, would have been a bar to the action. *Speck v. Phillips (a)*. *Finleyson v. Mackenzie (b)*, is relied upon by the other side, but that case was decided upon the old form of plea of payment into court. If this evidence be admissible, a defendant would be equally entitled to prove under such pleadings fraud, duress, infancy, coverture, or a release, and the object of the new rules might at any time be evaded by paying a shilling into Court. A defendant who has pleaded a bad plea ought not to be in a better situation than he would have been by pleading correctly.

Crowder, in support of the rule. It is conceded that the plea is bad, but in order to take advantage of that defect, the plaintiff should have demurred; having elected to waive his right, he must abide by the consequences. *Speck v. Phillips* does not apply. That was an action by a servant for his wrongful discharge by the defendant from his service, and the question then was, whether the defendant could give in evidence in mitigation of damages, matter which amounted to a justification of the discharge? In that case the defendant could not demur, but here a bad plea being allowed to remain on the record, the ques-

vers (a) is also an authority to shew that if a plaintiff chooses to go to trial on an irregular issue, the defendant is let into any defence which he might have to the action.

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Cur. adv. vult.

LORD ABINGER, C. B.—We have looked into the case of *Finleyson v. Mackenzie* decided by the Court of Common Pleas, and it appears so much in point, that we think we cannot refuse a rule for a new trial in this case. The defendant will exercise his discretion as to making any amendment in his plea, which is certainly a bad plea. I did wrong in refusing him an opportunity of going into his evidence, but I thought he was not at liberty to do so on this plea, and but for the authority of the Court of Common Pleas, I should think so still. The defendant may amend, on payment of the costs of the amendment only; however I do not mean to suggest that an amendment is necessary.

Rule absolute.

(a) 5 Esp. 38.

WRIGHT v. MAUDE and Others.

TRESPASS for false imprisonment against the defendants, who were commissioners of bankrupt. Plea, not guilty, by statute.

At the trial, before Lord *Denman*, C. J., at the Yorkshire Summer Assizes, it appeared that a fiat in bankruptcy had issued against a person of the name of Grier, who was alleged to have committed an act of bankruptcy, by assigning his effects to trustees, for the benefit of his creditors.

The plaintiff was summoned by commissioners of bankrupt to appear before them, at eleven o'clock, on a certain day, and produce an indenture. He appeared at eleven, and afterwards at one, when the

commissioners being engaged with another case, he left. He was subsequently apprehended by virtue of a warrant issued by the commissioners, which, after reciting the summons, directed the officer to bring the plaintiff "to be examined as aforesaid, and to produce the said assignment."

Held, first, that the warrant was regular, inasmuch as it was the duty of the plaintiff to wait until the commissioners were ready to examine him.

Secondly, that the warrant was not vitiated by the introduction of the words, "to be examined, and to produce the said assignment."

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The deed of assignment was in the possession of Messrs. Taylor and Co., attornies at Wakefield, and was attested by the plaintiff, who was their clerk. The defendants issued the following summons, directed to the plaintiff and others, under the 6 Geo. 4, c. 16, s. 33: "By virtue of a fiat in bankruptcy, bearing date, &c., these are to will and require you and each of you, to whom this our warrant is directed, personally to be and appear before the majority of us, the said commissioners, at, &c., at the hour of eleven in the forenoon of the 13th of March, and then and there to bring with you and produce to us a certain indenture of assignment, &c." The plaintiff, on the receipt of this summons, applied to his employers for the deed, but they having refused to let him have it, he attended without it, at the place and hour appointed, when he was informed by the solicitor to the fiat, that the commissioners were engaged on other business, and would not require his attendance until one o'clock. On his again attending at that hour, he saw one of the commissioners, who, on learning that he had not brought the deed, said, "You must have known that it was no use to come without the assignment, but we will hear what you have to say by and by." The plaintiff then went away, and a day or two afterwards was taken into custody by virtue of a warrant, issued by the commissioners. The warrant, after reciting the proceedings

Impey (a), was relied on. The learned Judge was of that opinion, but directed the jury to say; first, the amount of damage, assuming a trespass to have been committed; and, secondly, whether the commissioners had authorized the plaintiff to go away. The jury found the latter question in the negative, and also that the plaintiff had sustained no damage; upon which, the learned Judge nonsuited the plaintiff, reserving leave for him to move to enter a verdict for nominal damages.

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Knowles now moved accordingly, or for a new trial. There are several authorities to shew that an action will lie against commissioners of bankrupt. *Grocock v. Cooper* (b), *Isaac v. Impey* (c). [Lord *Abinger*, C. B.—There can be no doubt about that.] Then the plaintiff was not guilty of any disobedience to the summons, for he attended at the time and place appointed, when he was informed that his presence was not then required; he was, therefore, entitled to a fresh summons. But at all events the warrant is bad in form, as it directs the plaintiff to be taken into custody, not only for the purpose of being examined, but also until he should produce a deed which was not in his possession, and over which he had no control. Where a statute confers an authority to interfere with the liberty of the subject, its terms must be strictly pursued. *Bracy's case* (d), *Yoxley's case* (e), *The King v. Nathan* (f), *Evans v. Rees* (g).

LORD ABINGER, C. B.—There is no ground for a rule in this case. The 33rd section of the 6 Geo. 4, c. 16, authorizes the commissioners to summon the party to attend and produce such documents as they shall deem requisite, and if he shall not attend, then to issue a warrant to bring

(a) 1 B. & C. 163.

(b) 8 B. & C. 211.

(c) 10 B. & C. 442.

(d) 1 Salk. 348.

(e) 1 Salk. 351.

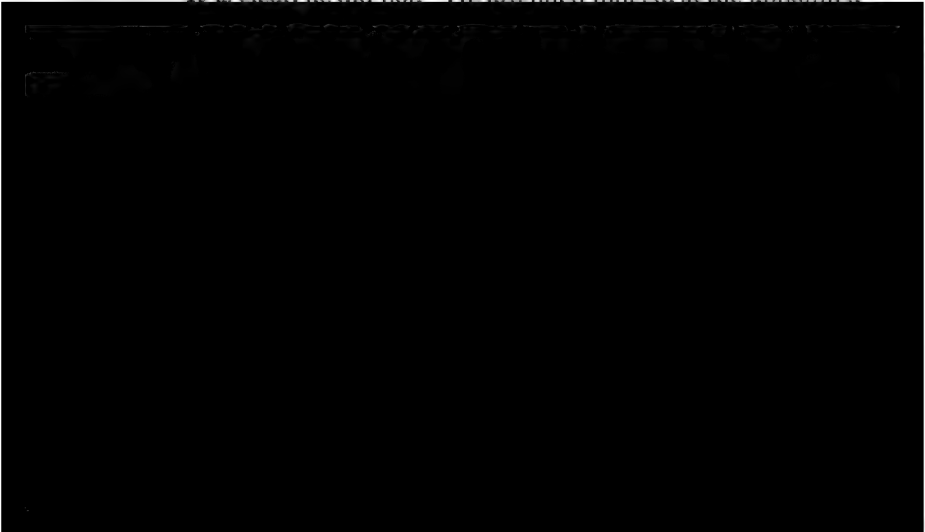
(f) 2 Str. 880.

(g) 12 Adol. & E. 55; 4 P. & D. 32.

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him before them, to be examined as aforesaid; that is, to the effect specified in the summons. Now the summons directs the plaintiff to appear before the commissioners to be examined in a particular manner, that is, with reference to a certain document. He does not obey this summons, and then a warrant issues, which states, that he is "to be examined as aforesaid," that is, in the manner indicated by the summons. If the warrant had merely directed the plaintiff to be brought up for examination, and had said nothing about the assignment, the plaintiff might then have contended, that the warrant was defective on that ground. With respect to the other point, I think that no fresh summons was required to compel the plaintiff's attendance at one o'clock. Commissioners of bankrupt have frequently several commissions, which must be taken in order, and a witness in one who comes and finds the commissioners engaged in another, has no right to make that circumstance an excuse for going away. The plaintiff in this case was bound to be present at one o'clock, and his leaving after the conversation with the commissioner, was altogether unauthorized.

PARKE, B.—I am of the same opinion. The first question is, did the plaintiff obey the exigency of the summons? It is clear, he did not. He attended indeed, at the appointed



of the 33rd section of the 6 Geo. 4, c. 16, which enacts, "that after adjudication, it shall be lawful for the commissioners, by writing under their hands, to summon before them any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy committed by him, and it shall be lawful for the said commissioners to require such person to produce any books, papers, deeds, writings, or other documents, in his custody or power, which may appear to the commissioners necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the commissioners are authorized to inquire into, and if such person, so summoned as aforesaid, shall not come before the commissioners, at the time appointed, &c., it shall be lawful for the said commissioners, by warrant, under their hands and seals, to authorize and direct the person or persons, therein named for that purpose, to apprehend and arrest such person, and bring him before them to be examined as aforesaid." Then, what is the meaning of the words "as aforesaid?" The commissioners have power to examine any person who can give information concerning the property or acts of the bankrupt; and ancillary to that, any person who can produce any deeds, in his custody or possession, that appear to them necessary for that purpose. If the person summoned, refuses to come, they may issue their warrant to compel him to appear, with the documents; but if he comes with, and refuses to produce them, they may commit him under the 34th section. Here then, the commissioners had issued a summons, directing the plaintiff to attend before them to be examined, and to bring with him a document, which would furnish them with the means of examining him with effect. He disobeys that summons; whereupon they issue a warrant for his apprehension "for the purposes aforesaid." The warrant should be ad idem with the summons, for if it were otherwise, the party might answer, that he had not brought the document, because he

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had not been required to do so by the warrant. There is, therefore, no ground for a rule in this case, and in strictness, the Judge, instead of nonsuiting, should have directed the jury to find for the defendants.

GURNEY and ROLFE, B.'s, concurred.

Rule refused.

MORGAN v. LEACH and Another.

A notice of action under the 24 Geo. 2, c. 44, s. 1, is not bad, by reason of its being signed by the plaintiff, or of its being served, not by the attorney, but by his clerk.

TRESPASS for false imprisonment. Plea not guilty by statute.

At the trial before *Rolfe*, B., at the last Pembrokeshire Assizes, it appeared that the plaintiff was a surveyor of highways, and that the defendants, who were magistrates, having been informed that a dangerous pit existed in the neighbourhood of a certain highway, and that a quantity of dung had been thrown upon the highway, directed the plaintiff, as surveyor, to fence the pit, and remove the nuisance. The plaintiff having omitted to do so, the defendants wrongfully convicted him. The conviction was attempted to be supported under the 20th and 73rd sections of the Highway Act, 5 & 6 Wm. 4, c. 50. The notice of action under the 24 Geo. 2, c. 44, s. 1 (*a*), was

signed by the plaintiff, indorsed by the attorney, and served by the attorney's clerk. It was contended, on behalf of the defendants, that the plaintiff ought to be nonsuited; on the ground, first, that the notice of action was served by the attorney's clerk, and not by the attorney; and, secondly, that the notice was signed by the plaintiff, and not by the attorney. The learned Judge overruled the objections, reserving leave for the defendants to move to enter a verdict.

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Evans moved accordingly. First, the notice of action should have been signed by the attorney. Several cases had decided that a notice under the 24 Geo. 2, c. 44, s. 1, must strictly follow the terms of that act. In *Lovelace v. Curry* (a), *Lawrence, J.*, in delivering judgment, mentions a case of *Taylor v. Fenwick, M. 23, Geo. B. R.*, in which the notice was written by the attorney, and signed by him thus, "given under my hand at Durham." The attorney, in fact, lived at Durham, but it was not expressly stated that Durham was the place of his residence. It was argued at the Bar that what appeared on the notice was equivalent to a positive allegation that the attorney lived at Durham, but the Court said, "the statute has prescribed a form which must be explicitly followed, and it admits of no equivalent. The statute was made to introduce a strictness of form in favour of justices, and it must be observed literally." Secondly, the notice should have been served by the attorney himself, and not by his clerk. The object of the statute evidently was, to require service of the notice by some party who was authorized to accept amends if tendered.

LORD ABINGER, C. B.—There is no ground for a rule in this case. The statute requires that a notice shall be delivered to the magistrate, or left at his place of abode

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by the attorney or agent. Here it is left by the attorney's clerk, which is equivalent to a service by the attorney himself. As to the other point, the notice is not bad by reason of its being signed by the plaintiff; it is indorsed by the attorney, as required by the statute, and that is sufficient.

PARKE, B.—I am of the same opinion. The statute does not require the notice to be signed. The signature of the plaintiff was an unnecessary act, and could not vitiate the notice. I also think that it was not necessary that the attorney should serve the notice with his own hand.

GURNEY, B.—The act does not make personal service upon the magistrate necessary; nor is it requisite for him to tender amends at the time of giving notice; the statute allows him a month for that purpose.

ROLFE, B., concurred.

Rule refused.

HURCUM v. STRIKER and Another.



The plaintiff besides seeking to recover damages under the special count of the declaration, also seeks to recover under the indebitatus counts of the declaration, the sum of 37*l.* being the balance of account for one quarter's cartage-work done by him for the defendants, commencing on the 30th of June, and ending on the 30th of September, 1842, after giving the defendant's credit for the sum of 3*l.* paid on account thereof.

At the trial before *Alderson*, B., at the London Sittings in this Term, it appeared that the plaintiff had entered the service of the defendants on the 30th of June, 1841, at the yearly salary of 160*l.*, payable quarterly. At the termination of the year the plaintiff was discharged, but it was agreed that he should continue his work during the month of July, 1842. The jury found that the defendants were justified in discharging the plaintiff for misconduct, but that he was entitled to a month's wages, and a verdict was found for the plaintiff, with 10*l.* 6*s.* 8*d.* on the count for work and labour, and for the defendants on the other issues. It was then objected on the part of the defendants that the plaintiff was precluded by his particulars from recovering a month's wages. The learned Judge having reserved the point,

M. D. Hill moved to enter a verdict for the defendants, and contended, that under the particulars of demand, the plaintiff could not recover less than a quarter's wages, which the jury had found he was not entitled to.

Lord ABINGER, C. B.—There is no ground for granting a rule. The meaning of the particular is, that the plaintiff seeks to recover the balance of a quarter's wages, or so much as he may be entitled to in respect of work actually done. There is no reason why he may not recover a month's wages under that particular.

PARKE, B.—I am of the same opinion. We ought to

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put a liberal construction on particulars of demand, else there would be, in fact, two declarations. The meaning of this particular is, that the plaintiff limits his claim to one quarter in point of time, and to the sum of 37*l* in respect of amount.

ALDERSON and ROLFE, B.'s, concurred.

Rule refused.

DOE dem. PRATTEN v. BOARD.

The Court has no power, under the Reg. Gen., H. T., 4 Vict. or otherwise to compel, a lessor of the plaintiff in ejectment to pay costs, unless he has entered into the consent rule.

IN this case the lessor of the plaintiff had delivered a declaration in ejectment, and obtained a rule for judgment, after which the defendant delivered a plea, together with the consent rule signed by him. The lessor of the plaintiff refused to join in the consent rule, upon which the defendant ruled him to reply, and in due course signed judgment of non pros., and taxed his costs. The lessor of the plaintiff refused to pay the costs, on the ground that he had not entered into the consent rule.

Thomas moved for a rule, calling on the lessor of the plaintiff to show cause why he should not pay those costs.

rules and practice, shall be entitled, on production of such plea, to an order of a Judge for leave to draw up a rule for judgment, as of the time at which such rule for judgment would have been obtained.

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Prideaux shewed cause. The Court has no jurisdiction to award costs against a lessor of the plaintiff, who has not entered into the consent rule, there being merely a nominal plaintiff. *Goodright v. Badtittle* (a), *Smith v. Barnardiston* (b), *Doe d. Vernon v. Roe* (c), though they may stay the proceedings in a second action until the costs of the first are paid. *Doe d. Langdon v. Langdon* (d). Nor can the Court compel the plaintiff to enter into the consent rule, since the proceedings are at an end. The Reg. Gen., H. T., 4 Vict., does not apply, its only object being to enable the defendant to appear and defend the action, without the formal process of a rule for judgment against the casual ejector. The defendant in this case has not availed himself of its provisions.

Thomas, in support of the rule, argued, that the lessor of the plaintiff, by appearing on the present rule, had declared himself to be the real plaintiff in the suit, and had given the Court a jurisdiction over him.

LORD ABINGER, C. B.—The Court has no power to give costs in this case. The rule was made for the convenience of defendants. The present rule must be discharged, with costs.

PARKE, B.—The rule which has been referred to applies to those cases only where no judgment against the casual ejector has been moved for on the part of the plaintiff, and the intention of it was, to give the tenant an opportunity

(a) 2 W. Blac. 763.

P. 237.

(b) 2 W. Blac. 904.

(d) 5 B. & Ad. 864.

(c) 7 Adol. & E. 14; 2 N. &

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of coming in and defending the action, without putting him to the trouble of searching to see if judgment against the casual ejector has been moved for. The rule is not very clearly expressed, as to the consequences of the plaintiff not proceeding afterwards; but, at all events, it is applicable to those cases only where parties have availed themselves of its provisions. As far as the old practice is concerned, the authorities cited clearly shew that the Court has no power to compel a lessor of the plaintiff to pay the costs of a judgment of non pros., unless he enters into the consent rule. The costs of this rule will be paid to the person whom the defendant has recognised as the real plaintiff, by serving him with the rule nisi.

ALDERSON and ROLFE, B.'s, concurred.

CLOWES v. BRETTELL.

An act of Parliament, incorporating a company, enacted, that every judgment against the nominal defendant, might be "ex-

WILLES moved for a rule, calling on one Welby to shew cause why execution should not issue against him or his goods. The defendant was a member of a company incorporated by the 4 & 5 Vict. c. lxxxix, intituled, "An act to enable the Patent Rolling and Compressing Iron Company to purchase certain letters patent, and to sue

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that it shall be lawful for the plaintiff to cause execution upon any judgment, decree or order obtained by him in any such action or suit against any such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the company, and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into," upon which, such action or suit shall have been instituted; provided always, that no such execution against any person being, or having ceased to be, a shareholder, shall be issued without leave first granted by the Court in which such judgment, decree or order shall have been obtained upon motion, in open Court, and after notice of such motion given to the person sought to be charged." The plaintiff had issued execution against the effects of the company, but they had proved insufficient; and the only question was, whether it was competent to enter on the record a suggestion of the fact of Welby being a shareholder, or whether the plaintiff was bound to proceed by *scire facias*?

Peacock shewed cause, in the first instance, and cited *Ransford v. Bosanquet* (a), and *Eardley v. Law* (b), as authorities to shew that the proceeding should be by *scire facias*.

Willes, *contra*, argued, that a *scire facias* was not necessary, as the 11th section directed that execution should issue against every shareholder, "as if he had been by name a party to such proceedings."

PER CURIAM.—The point has been already solemnly

(a) 12 Adol. & E. 813.

(b) 12 Adol. & E. 802; 4 P. & D. 379.

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decided, therefore, the rule must be absolute to issue a scire facias.

Rule accordingly (a).

(a) *Wingfield v. Barton*, ante, p. 355.

WILLSON v. CAREY and CUNNINGTON.

Where several defendants, whose interest is identical, plead separately, similar pleas, which are demurred to, one counsel only is entitled to be heard on the argument.

IN this case, the two defendants pleaded separately, similar pleas, and demurred specially to the applications thereto. The question raised by the demurrer was substantially the same in each.

N. R. Clarke having been heard in support of *Cunnington's* demurrer.

Martin appeared to support *Carey's* demurrer.

W. H. Watson for the plaintiff, objected that two counsel could not be heard in support of two defendants, whose interest was identical, and whose pleas and demurrers were substantially the same. He referred to *Brook v. Turner* (a), in which case the Court of Common Pleas, under similar circumstances, had refused to hear more than one counsel

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WARNER v. POWELL.

THIS was an interpleader rule obtained by the sheriff of Coventry. On the parties appearing on the 15th of November,

The Court has jurisdiction over a sheriff, in respect of writs executed by him, notwithstanding his office has been abolished by act of Parliament.

R. V. Richards for the execution creditor, objected that the jurisdiction of the Court over the sheriff had been put an end to by the 5 & 6 Vict. c. 110, the 10th section of which enacts, "that after the 9th day of November, there shall be no sheriff and no recorder in the city of Coventry, and that the mayor of Coventry for the time being shall be the returning officer for the election of members to serve in Parliament for the said city."

PER CURIAM.—The sheriff having executed the writ, is amenable to the Court, notwithstanding the act of Parliament.

IMRAY v. MAGNAY.

CASE against the Sheriff of Middlesex, for neglecting to levy under a writ of fieri facias, and for a false return of nulla bona. Plea, not guilty.

At the trial before Lord *Abinger*, C. B., the plaintiff proved that he had obtained a judgment against one *Gompertz*, and on the 25th of February, 1842, issued a writ of fieri facias, which was delivered to an officer of the name of *Thompson* to execute. *Gompertz* was at that time living in *Chester Square*, and was in possession of furni-

In an action against a sheriff for a false return of nulla bona, to which the defence is, that prior writs are in the hands of the sheriff, to an amount sufficient to cover the whole of defendant's goods, the plaintiff may give evidence

that the judgments and prior executions are fraudulent and void, without proving that the sheriff was a party to, or had notice of the fraud, and for that purpose, the conduct of the debtor, with respect to previous executions connected with the fraud, is admissible.

Where a sheriff has seized goods under a writ issued upon a judgment, fraudulent, under 13 Elis. c. 5, against creditors, and such goods remain in his hands, he is bound to seize and sell them under a subsequent writ, founded on a bona fide debt.

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ture and goods which were valued at considerably more than 1000*l*. Thompson refused to levy under the plaintiff's writ, alleging that the goods were already in the possession of the sheriff under a prior writ issued at the suit of one Bebb. On the 4th of March, the plaintiff ruled the sheriff to return the writ, and on the 10th of March, the latter took out a summons under the Interpleader Act, which was heard before Lord *Denman*, C. J., who refused to make any order. On the 14th of March, the sheriff returned *nulla bona*, upon which the present action was brought. On the part of the defendant, it was proved that in the month of January, 1841, a writ was delivered to him to levy on the goods of Gompertz 3000*l*, at the suit of one Watson. On the 5th of July, 1841, another writ was delivered to him at the suit of one Lewis for 263*l*. On the 4th of December, 1841, another writ was delivered to him at the suit of one Teed for 82*l*. On the 7th of December, 1841, another writ was delivered to him at the suit of one Bebb for 3015*l*. Another writ had also issued at the suit of one Palmer. In reply to this evidence, the plaintiff proposed to prove that Watson's writ had been withdrawn, and that Bebb's writ was fraudulent and void as against a *bonâ fide* creditor, and for this purpose he tendered evidence of the conduct of Gompertz with respect to former executions. It was objected on the

of Gompertz. Taylor had refused to proceed to judgment without Watson's authority, upon which Gompertz produced a paper purporting to be written by Watson, as an authority for Taylor to proceed. This paper was proved to be in the handwriting of Gompertz's brother-in-law. A verdict having been found for the plaintiff,

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Erle had obtained a rule nisi for a new trial, on the ground of misdirection, against which

Crowder, R. V. Richards, and Chambers shewed cause. The facts of this case are such as to render evidence of fraud admissible against the sheriff. Notwithstanding the prior executions, Gompertz remained in possession of the property, and, under the circumstances, it was the duty of the sheriff to make inquiries, when he would have found that those executions were fraudulent, *Lovick v. Crowder (a)*. The general rule is, that in the case of two executions, the sheriff must stand indifferent between the parties; if he favours the one party whose execution turns out to be merely colourable, he is liable to the other. In *Warmoll v. Young (b)*, which was an action against a sheriff for a false return of nulla bona, the sheriff proved that he had seized all the goods of the debtor under a fieri facias in another suit, before the plaintiff's writ was delivered to him. The plaintiff, in answer, proved that the judgment upon which the first execution was sued out, was entered up upon a warrant of attorney fraudulently executed by the debtor in order to defeat the plaintiff's execution, and that he gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff, on the first day of the next Term, was served with a rule to return the writ of fieri facias under which he had first levied. He did not give any notice to the plaintiffs, by whom the second fieri facias had been sued out, that he had been served with such a

(a) 8 B. & C. 132.

(b) 5 B. & C. 660.

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rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiff at whose suit the first fieri facias had been sued out, and it was held that this was misconduct in the sheriff, and rendered him liable to the plaintiff in the second execution. In the present case, there was sufficient to shew that Thompson, the officer, had lent himself to Gompertz, and was in league with him. *Barber v. Mitchell (a)*, which will be cited on the other side, is only an authority to this extent, that the Court will not interfere summarily to compel the sheriff to pay over the proceeds of an execution to a bonâ fide creditor upon the mere belief that a prior execution is fraudulent. In this case, fraud clearly appears. In *Lovick v. Crowder*, Bayley, J., says, "Where a plaintiff sues out execution, and seizes under a fieri facias the goods of his debtor, and suffers them to remain long in the debtor's hands, a subsequent execution creditor may treat the goods as the goods of the debtor."

Erle and *Watson*, in support of the rule. The facts do not afford evidence of collusion or fraud on the part of the sheriff, in the absence of which, he cannot be liable. An execution is not necessarily fraudulent because it has been suspended. *Warmoll v. Young*, is no authority that a party

directed the sheriff not to sell. In *Barber v. Mitchell, Patteson, J.*, in delivering judgment after consideration, says, "The question as to whether the judgment first obtained was fraudulent or not, could not be raised in an action against the sheriff. For that purpose, an issue must be directed."

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Cur. adv. vult.

PARKE, B.—The judgment of the Court was delayed in this case, for the purpose of considering whether the ruling of my Lord Chief Baron on two questions, which arose at the trial, was correct in point of law. This was an action by a judgment creditor against a sheriff, for neglecting to levy, and returning nulla bona. The defence was that the goods, proved to be in the possession of Gompertz, the original defendant, of the value of considerably more than 1000*l.*, were not seizable under the plaintiff's writ, because there were, before its delivery to the sheriff, five writs of fieri facias in the hands of the sheriff, commanding him to levy to a much greater amount. The answer to this case on the part of the plaintiff was, that part of those were withdrawn, and the principal judgment and execution remaining, were fraudulent against bonâ fide creditors, and if it was removed, that there were goods enough to answer the plaintiff's debt. The plaintiff's counsel offered evidence of the fraud. The counsel for the defendant objected that such evidence could not be received against the sheriff, unless the sheriff had notice of the fraud; and the Lord Chief Baron admitted the evidence, reserving the point. This is the first point to be decided. In order to show that the judgments and executions were fraudulent, evidence was offered of the conduct of Gompertz with respect to former executions. The principal writ of fi. fa. relied on by the defendants was at the suit of one Bebb for 3015*l.* delivered to the sheriff on the 7th December, 1841, an execution was in the sheriff's hands from January, 1841, at suit of one Watson for 3000*l.*, and shortly before Bebb's

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writ was brought to the sheriff's office to be executed, he declined to do so unless Watson's was withdrawn; Gompertz procured an authority from Watson to withdraw it, and Gompertz's attorney paid the costs. Watson's writ had been issued in the beginning of 1841, by a Mr. Taylor, in an action commenced by him at the request of Gompertz. As Taylor would not proceed to judgment without Watson's authority, Gompertz undertook to procure it; and he accordingly produced a paper purporting to be written by Watson, and an authority to proceed; but there was evidence that the paper alleged to be in Watson's handwriting, was in that of a brother-in-law of Gompertz. Mr. *Erle*, for the defendant, objected that the conduct of Gompertz generally on previous executions was not admissible in an action against the sheriff; and this is the second question we have to decide. If Bebb's execution is rejected, the others being to an amount of about 800*l.*, and upwards, do not appear to cover the whole of the effects of which *primâ facie* evidence was given. The objections made by Mr. *Erle* ought not to prevail. So far as it relates to the rejecting evidence that the executions were fraudulent, that is to say, that they were delivered to the sheriff for the purpose of covering and protecting the property against other executions, and not for the purpose of being carried into effect by the levy, the cases

between the first execution and the second. But in this case, evidence was received to impeach the judgment itself, on the ground of fraud; and the question is, whether evidence was admissible for that purpose. Mr. *Erle* contended, on the trial, that the evidence was inadmissible, without notice of the fraud to the sheriff; but if my Lord had reserved this question, there was evidence given of notice at least sufficient to put the sheriff on inquiring whether such fraud had been committed; for notice to the sheriff's officer to whom the execution of the plaintiff's writ was committed, after the delivery of the writ to him, was notice to the sheriff himself; and, therefore, that objection of Mr. *Erle* cannot prevail. He contended, however, on the motion before us, that notice was not enough, and that the sheriff could not be liable unless there was fraud, and the sheriff was a party of it. It appears to have been much doubted, whether, in an action against the sheriff, it could be shewn that a prior judgment was fraudulent against a creditor seeking to effect a subsequent execution, and the point has never been expressly decided, though there are dicta upon it. In *Warmoll v. Young* (a), which was an action against a sheriff for not executing a writ of *fi. fa.*, the defence was, that he had previously seized at the suit of one Knight, and the answer to that defence was, that Knight's judgment was fraudulent and void. Lord *Tenterden*, C. J., received the evidence on the authority of a decision of Lord *Kenyon*, in the case of *Kempland v. M^r Auley* (b), having first thought it inadmissible; he reserved the point however for the consideration of the Court of Queen's Bench, which supported his Lordship's ruling, not on the ground that such evidence was in all cases admissible, for they declined to decide the general question, but because it appeared, in that case, that the sheriff's officer, after sale, and after notice to retain the money given by the plaintiff in order that he

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(a) 5 B. & C. 660.

(b) Peake, 85.

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might move the Court, paid it over to Knight, without informing the plaintiff; and the Court held, that the sheriff was thereby guilty of negligence, and as Knight had no right to receive it, was responsible to the plaintiff for the amount; that he had lent his aid to one party instead of standing indifferent, and must stand or fall by the right of that party. On the narrow ground on which this case was decided, the admissibility of the evidence of fraud in the judgment obtained by Bebb, may possibly be sustainable, as there was some evidence that the sheriff lent himself to Bebb instead of standing indifferent between the parties. It appears to us, however, that we ought to decide the general question, which is left in a doubtful state. The authority of Lord *Kenyon*, in the case above referred to, turns out not to be conclusive; seeing that in that case the sheriff was indemnified by the creditor, and according to several cases, stood in the situation of the creditor, and, therefore, might impeach the judgment as void against him for fraud. In a subsequent case, my Brother *Patteson* expressed an opinion, on a motion before him, that the question, whether a judgment was fraudulent or not against a creditor, could not be raised in an action against a sheriff, though it could, if he was a party to the fraud. *Barber v. Mitchell* (a). On the other hand, in an action for a false return, Lord *Ellenborough* appears to have thought evidence

arrived is, that where goods seized under a former writ, founded on a judgment fraudulent against creditors, remaining in the sheriff's hands are capable of being seized, the sheriff is compellable to seize and sell such goods under a subsequent writ founded on a bonâ fide debt; and this, by virtue of statute 13 Eliz. c. 5, ss. 1 & 2, which enacts, "That all feoffments, gifts, grants, bargains, and conveyances of lands, tenements, hereditaments, goods and chattels, &c., and all and every bond, suit, judgment, and execution devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, shall be from henceforth deemed and taken (only as against that person, his heirs, successors, executors, administrators and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as aforesaid, are, shall, or might be in any way disturbed, hindered, delayed, or defrauded), to be clearly and utterly void, frustrate, and of none effect, &c." The judgment is, by the statute, made void against creditors, but, by implication, it is void against a sheriff who acts on a writ of a creditor; as a deed which is fraudulent against creditors, *Turvell v. Tipper* (a). And it is now a frequent occurrence that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors, and is responsible in an action for a false return at the suit of a creditor; and the statute seems to me to put both on the same footing. The creditor has no other direct way of avoiding the judgment than by enforcing his execution, for notwithstanding the execution upon a bonâ fide debt, it may be the ground of an appli-

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(a) Latch. 222.

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cation to the equitable jurisdiction of the Court to set it aside, which I apprehend has arisen in comparatively modern times. Still, whatever right the creditor had at the time of the statute, he has now. If, indeed, the right of no creditor intervenes, the sheriff is bound to sell under the writ on a fraudulent judgment, for such judgment is good between the parties, and void only as against creditors; and if he sells under such a judgment to a bonâ fide purchaser, and not to the fraudulent plaintiff himself, he cannot be compelled to re-seize the goods, for the purchaser has a good title. In the present case, a part of the goods seized under Bebb's writ were unsold; they were claimed by Palmer; they had been in the possession of Gompertz before; and if Palmer's claim was untenable, (and the sheriff was clearly responsible for its validity), and the judgment at the suit of Bebb void against the plaintiff's execution, so that these goods could not be sold under it as prejudicial to the plaintiff's execution, the sheriff was liable to this action for not selling them. The remainder sold to Bebb was also seizable, as Bebb, on that hypothesis, was a party to the fraud against creditors; and the sheriff was responsible for neglecting to re-seize them if he had notice of the fraud, or could have discovered it by reasonable inquiries, and of this there was sufficient evidence. I think, therefore, and we all agree, that that evidence was admissible.

same fraud. As to his conduct in originally causing Watson's writ to issue, it may be doubtful whether that was admissible; but the point does not appear, from Lord Abinger's note, to have been taken. The rule to set aside this verdict must, therefore, be discharged.

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Rule discharged.

TOBIN v. CRAWFORD and Others.

THIS was an action of assumpsit for freight. The defendants pleaded, first, non assumpsit; secondly, a special plea, to which there was a replication, a rejoinder, and special demurrer thereto; thirdly, a custom, which was traversed.

The issues on the first and third pleas were tried at the Liverpool Summer Assizes, 1837, when a verdict was found for the plaintiff on both issues, with 741*l.* 5*s.* 4*d.* damages, and leave was reserved for the defendants to move to enter a nonsuit or a verdict for them. The demurrer was argued and judgment given for the plaintiff. The defendants moved in pursuance of the leave reserved, and obtained a rule nisi, on shewing cause against which, the Court directed the facts to be stated in a special case, with liberty for either party to turn the case into a special verdict. In Easter Term, 1839, the special case was argued, and the Court gave judgment thereon for the defendants (a).

The plaintiffs then turned the special case into a special verdict, and sued out a writ of error thereon; the Court of Error affirmed the judgment of the Court below. The Master, on taxation, having allowed the defendants the costs of the trial,

A plaintiff obtained a verdict, leave being reserved for defendant to move to enter a nonsuit or a verdict for him. A rule nisi was accordingly obtained, and on shewing cause, the Court directed a special case, upon which they gave judgment for the defendant: the special case was then turned into a special verdict, and the judgment of the Court below affirmed: *Held*, that the defendant was entitled to the costs of the trial.

Ellis obtained a rule, calling on the defendants to shew cause why the Master should not review his taxation, and

(a) 5 M. & W. 235; 9 M. & W. 716.

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why he should not be directed to allow the plaintiff the costs of the trial of the issues in fact, or that such costs be disallowed to the defendants.

W. H. Watson shewed cause, and urged that the result of case placed the defendants in the same position as if a verdict had been found for them at the trial.

Ellis, in support of the rule. In *Thomas v. Hawkes* (a), the plaintiff having obtained a verdict, a rule was made absolute for a new trial, no mention being made of costs; the parties afterwards agreed to refer the cause, the costs to abide the event, and the arbitrator having awarded in favour of the defendant, it was held, that he was not entitled to the costs of the first trial. The only difference between that case and the present is, that here, the rule nisi was granted to enter a verdict for the defendants, but if it had been argued, it could only have been absolute for a new trial, as there was evidence to be submitted to the jury.

Lord ABINGER, C. B.—According to the terms of the rule nisi, we might have directed a nonsuit or a verdict for the defendants, but for the sake of convenience, the facts were stated in the form of a special case. The result, however, has been the same, viz., judgment for the defendants.

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JACKSON v. UTTING and Four Others.

M*MARTIN* shewed cause against a rule obtained by *Humfrey*, for judgment as in case of a nonsuit. There were four defendants, and issue had been joined with three of them; but the fourth had since the commencement of the action, filed his petition and schedule in the Court for the relief of Insolvent Debtors, and by an order of that Court had been discharged from the debt which formed the subject of the action.

Where issue was joined with three only of four defendants, and the other had obtained his discharge under the Insolvent Debtors' Act, since the commencement of the suit: *Held*, that there could be no rule for judgment as in case of a nonsuit.

PARKE, B.—In order to support the application, the defendants ought to show that there is a complete issue joined, which can be tried. That is not so, as regards one defendant. There cannot be several trials.

Rule discharged.

 REID and Another v. REW.

T*HIS* was an action on a policy of insurance on a ship and cargo bound from Norway to South America. The policy was alleged to have been effected by the plaintiffs as agents for one N., who was averred to have an interest therein. The defendant proposed to plead the following sixteen pleas:—

First, that the policy was made by fraud.

Second, that the defendant's promise and subscription to the policy were obtained by fraud.

Third, a traverse that the goods were loaded on board.

Fourth, a denial that they were placed on board the ship to be carried on that voyage.

To a count on a policy of insurance on a ship and cargo, the Court refused to allow the defendant to plead that the policy was obtained by fraud, together with pleas that the defendant's subscription to the policy was obtained by fraud; that a small portion only of the cargo was put on board as a cloak, and pre-

tence, and with the intention of defrauding the underwriters; also that a small portion only of the cargo was loaded on board, with intent that it might appear to constitute a valuable cargo.

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Fifth, that the goods were fraudulently overvalued in the policy.

Sixth, a traverse of the interest of N. in the ship.

Seventh, a traverse of his interest in the goods.

Eighth, a denial that the policy was effected by the plaintiffs as agents of N.

Ninth, a denial that the vessel ever sailed on the voyage.

Tenth, a traverse of the loss of the goods.

Eleventh, a traverse of the loss of the ship.

Twelfth, that the goods were fraudulently lost.

Thirteenth, that the ship was fraudulently lost.

Fourteenth, that a small and inconsiderable portion only of the cargo was put on board as a cloak and pretence for effecting a policy of insurance, and with the intent of defrauding the underwriters in the event of the loss of the ship.

Fifteenth, that a small and inconsiderable portion only of the cargo was loaded on board with intent that it might appear to constitute a valuable cargo, and with the intent that it should be lost by fraud.

Sixteenth, deviation.

Greenwood having moved for leave to plead the above several matters,

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SPONG v. WRIGHT.

DEBT by drawer against acceptor of a bill of exchange for 20*l.*, payable to the drawer's order, three months after date. There were also counts for money lent and for money due on an account stated.

The defendant pleaded except as to 10*l.* 11*s.*, parcel, &c., a set-off for board and lodging; the plea concluded :—
“which said sum of money so due to the defendant as aforesaid, exceeds the supposed debt above demanded, except as in the introductory part of this plea mentioned, and all damages by the plaintiff sustained, by reason of the detention thereof; and out of which said sum the defendant is ready and willing, and hereby offers to set-off and allow to the plaintiff the full amount of the said debt, and all damages on occasion of the detention thereof. Verification.

And as to the sum of 10*l.* 11*s.*, payment of that amount into Court, and that the defendant never was indebted to the plaintiff, to a greater amount than the said sum of 10*l.* 11*s.*, in respect of the causes of action in the introductory part of this plea mentioned. Verification.

Replication to first plea, that the said several alleged debts and causes of set-off, in the said first plea mentioned, did not, nor did any or either of them accrue to the defendant within six years before the commencement of the action, and this the plaintiff prays may be inquired of by the country. To the second plea, the plaintiff replied, by accepting the money in satisfaction of the causes of action as to the said sum of 10*l.* 11*s.*

The defendant rejoined to the replication to the first plea, by adding the similitur.

The cause was tried before *Rolfe*, B., at the Middlesex Sittings, in Hilary Term, when a verdict was found for the plaintiff.

To debt by drawer against acceptor of a bill of exchange, the defendant pleaded a set-off. The plaintiff replied that the causes of set-off did not accrue within six years before the commencement of the suit, concluding to the country : The defendant added the similitur.

Held, after verdict for plaintiff, that there was no definite issue joined.

Montagu Smith, on the authority of *Wheatley v. Wil-*

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hams (a), obtained a rule nisi for a repleader on the ground that there was no definite issue joined on the replication of the Statute of Limitations.

Creasy shewed cause. The objection should have been taken on special demurrer. In *Chitty on Pleading* (b), it is said, "Since this statute, (4 Ann. c. 16, s. 1,) a wrong or defective conclusion, either to the country or with a verification, can only be taken advantage of on special demurrer." Here, there is a substantial issue raised, viz., whether or no the set-off accrued within six years. *Smith v. Smith* (c) is an authority to shew that an informal conclusion of a plea is no ground for arresting the judgment, or for a repleader, if there has been an issue to try. In that case, to debt for goods sold, the defendant pleaded payment of a sum of money in satisfaction and discharge of the debt and damages, concluding to the country, and the Court refused a rule to arrest the judgment, or for a repleader, and observed that the objection should have been taken on special demurrer.

Montagu Smith, in support of the rule. *Wheatley v. Williams* is an express authority to shew that there must be a repleader. In this case, as in that, there is nothing on the record equivalent to an averment that the cause of set-

tried; but in *Wheatley v. Williams*, my Brother *Parke* pointed out this difficulty, that there was a negative, and no affirmative; nothing on the record is equivalent to an averment, that the cause of action arose within six years. There is the same difficulty in the present case, for the plea of set-off does not contain any averment that the matter arose within six years, and the replication states that the plaintiff was not indebted, for the causes of action did not accrue within six years. Then, in order to have raised a definite issue the defendant should have rejoined that they did accrue within six years.

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GURNEY and ROLFE, B.'s concurred.

Rule absolute, with liberty to amend.

ASTON v. GREATHEAD.

CROMPTON moved for leave to enter an appearance for the defendant under the 12 Geo. 1, c. 29, s. 1. A copy of the writ of summons had been given to a clerk of the defendant, who was at the same time told to deliver it to his master, which he said he would do. Subsequently the defendant came to the office of the plaintiff's attorney with the writ in his hand, which he then stated he had received, and afterwards wrote a letter to the attorney stating that he had received it on the 24th of October, 1842. The officer had refused to enter an appearance upon an affidavit of the above facts, and *Alderson*, B., at Chambers, had refused to make an order for that purpose. It was submitted that the above facts were equivalent to a personal service. In *Jervis's* rules (a) it is said, if such circumstances be shewn as satisfy the Court that the process has come to the hands of the defendant, that is equivalent to a direct

Where a copy of a writ of summons had been given to the defendant's clerk, who was told to deliver it to his master, and the defendant subsequently came to the office of the plaintiff's attorney with the writ in his hand; the Court allowed the plaintiff to enter an appearance for defendant under the 12 Geo. 1, c. 29.

(a) 383.

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allegation of personal service. In *Williams v. Piggott* (a), Lord Abinger, C. B. says, "it is true that the statute requires a personal service, but what shall be deemed personal service the act of Parliament has not specifically defined. Suppose the defendant in answer to a letter acknowledged the receipt of the writ; strictly speaking that would not be personal service. So if the party suing throws the writ upon the floor, and sees the defendant pick it up, that in one sense is not personal service, but who can doubt it is sufficient to satisfy all the statute requires. Here, the plaintiff makes a circumstantial affidavit, from which it may be fairly inferred that the defendant received the process, and she does not venture to deny that she had full knowledge of it.

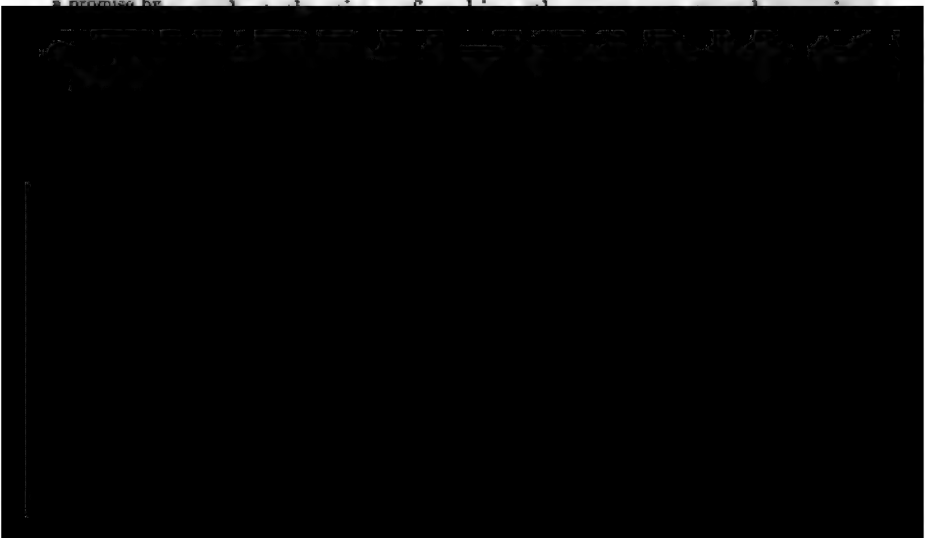
PER CURIAM.—You may take a rule.

(a) *Ante*, vol. 5, p. 322, O. S.; 1 M. & W. 574.

ISHERWOOD v. WHITMORE and Others, Assignees of
 JARRETT, a Bankrupt.

Declaration on
 a promise by

THE first count of the declaration stated, that before



was agreed between the plaintiff and the defendants, that the plaintiff should deliver up to the defendants the said goods, and abandon his said lien thereon, and that the defendants, should, therefore, pay the plaintiffs the sum of 250*l.* upon the delivery of the said goods to the defendants, and thereupon afterwards, to wit, on, &c., in consideration of the premises, and that the plaintiff, at the request of the defendants, had then promised the defendants to perform the said agreement in all things on the part of him, the plaintiff; the defendants then promised the plaintiff to perform the said agreement in all things on the part of them, the defendants. And the plaintiff says, that afterwards, and after the making of the said agreement and promises, and before the commencement of this suit, to wit, on, &c., the plaintiff was ready and willing, and then tendered and offered to deliver up the said goods to the defendants, and to abandon his said lien thereon, and then requested the defendants to accept the said goods, and the said abandonment of the said lien of the plaintiff, and to pay the plaintiff the said sum of 250*l.*; and although the plaintiff has always performed the said agreement in all things on his part, yet the defendants, not regarding their said promise, did not, nor would, when they were so requested, or at any time before or since, accept the said goods, or any of them, or the abandonment of the said lien of the plaintiff, or pay the plaintiff the said sum of 250*l.*, or any part thereof, but then and always neglected and refused so to do.

Plea. That the said hats in that count mentioned, were certain hats, which one Arthur Jarrett, before he became bankrupt, had deposited with the plaintiff, upon certain good considerations arising upon dealings and transactions then had between the plaintiff and the said Arthur Jarrett; and that the said agreement, in the said first count mentioned, was made and entered into between the plaintiff and the defendants, respecting the said hats so deposited as aforesaid, without the defendants, or any person on

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their behalf, having at any time had any means or opportunity of inspecting or examining the same, or any part thereof, and without any such inspection or examination; and further, that they, the defendants, were always, from the time of the making of the said promise and agreement, ready and willing and desirous to accept and receive from the plaintiff the said hats, which had been so deposited by the said Arthur Jarrett with the plaintiff, as aforesaid, and upon which the plaintiff had such lien as in the said first count mentioned, and to pay to the plaintiff the said sum of 250/. upon the delivery of such hats to the defendants; and that the plaintiff, after the making of the said agreement, to wit, on, &c., offered to deliver to the defendants divers, to wit, two closed casks, which the plaintiff then represented and alleged to the defendants, contained the said hats which had been so deposited by the said Arthur Jarrett with the plaintiff as aforesaid, which is the same alleged readiness and willingness of the plaintiff to deliver up the said hats to the defendants, and to abandon his said lien thereon, as in the said first count mentioned, and the same alleged tender and offer therein in that behalf mentioned. But the defendants, in fact, further say, that the defendants did not, nor did either of them, at the time of such offer, or at any other time know, (save from the said representation of the plaintiff as afore-

although the plaintiff then had notice, as the fact was, that the defendants were then ready and willing to accept and receive the said hats, and to accept and receive the said casks upon being satisfied that the said hats were, in fact, contained therein, and thereupon to pay to the plaintiff the said sum of money in the said first count mentioned; yet the plaintiff then and from thence hitherto, wholly refused to permit the said closed casks to be opened, or to allow to the defendants, or to any person on their behalf, any inspection or examination of the contents thereof, and the said casks always, until and at the time of the said supposed breach of promise in the said first count mentioned, remained, and were wholly closed and fastened, and the contents thereof unknown to and unseen by the defendants, wherefore the defendants did then, as they lawfully might, refuse to accept or receive the said casks, or to pay to the plaintiff the said sum of 250*l*. in the first count mentioned, which is the same supposed refusal and breach of promise whereof the plaintiff hath therein complained against the defendants. Verification. Special demurrer assigning for causes that the said second plea contains an argumentative traverse of the averments in the said first count, of the plaintiff's readiness and willingness to deliver up to the defendants the goods in the said first count in that behalf mentioned, and to abandon his lien thereon; the goods which the plaintiff is in the said first count averred to have been ready and willing to deliver up and abandon his lien upon being, by necessary intendment and construction of the said first count, the very goods concerning which the said agreement in the said first count mentioned was made. That the said second plea contains an argumentative traverse of the breach alleged in the said first count, the goods which the defendants are therein alleged to have refused acceptance of being, by necessary construction and intendment of the said first count, the very goods concerning which the said agreement in the said first count

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mentioned was made. That the said second plea is an argumentative traverse of the allegation contained in the said first count, of the plaintiffs having performed the said agreement in the said first count mentioned in all things on the part of the plaintiff. That the said second plea ought, for the reasons before stated, to have concluded to the country, or with the formal and special traverse, *absque hoc*, &c. That the said second plea is an argumentative traverse of the defendants' promise alleged in the first count, which is to accept the said goods absolutely, and not subject to the defendants' right of inspection thereof, and, therefore, amounts to the plea of the general issue. That the second plea is bad, because the matters therein stated, constitute no excuse for not accepting the said goods, inasmuch as the defendants might have rescinded the said contract if, on inspection of the said goods, it should have been found that they were not the very goods concerning which the said agreement was made. That the said second plea is bad, inasmuch as it is no answer in law to the actual breach alleged in the declaration, which is not that the defendants did not pay for the said goods, but that they did not accept the same; and that the said second plea is otherwise insufficient.

Byles, in support of the demurrer. The plea is bad for

ing the goods, the plea should have set it out. In *Smart v. Hyde* (a), which was an action on the warranty of a horse, the defendant pleaded that the horse was sold subject to a condition that the warranty should remain in force until noon after the sale, when the responsibility of the vendor would terminate unless a notice and certificate of unsoundness was in the mean time given, and the plea was held good, on the ground that it was consistent with the contract stated in the declaration. But this case is distinguishable, for if the plea assumes to be in confession and avoidance, it should have set out the condition. The meaning, however, of the plea is, that the defendants did not know the contents of the two closed casks sent to them, and that is an informal denial both of the tender and the breach. [*Parke, B.*, referred to *Pettitt v. Mitchell* (b)].

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Ball, contra. The plea is good; it discloses a valid defence to the action by shewing that the plaintiff delivered the goods inclosed in such a manner that the defendants had no opportunity of inspecting them, or of ascertaining whether they were really those he bargained for. In *Lorymer v. Smith* (c), it was held that the buyer of a parcel of wheat by sample, has a right to inspect the whole in bulk at any proper and convenient time; and if the seller refuses to show it, the buyer may rescind the contract. There, Lord *Ellenborough* says, "If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of a compensation for the dissimilarity. The legal mode of dealing is, that if the article agreed on be not furnished, I may keep my money in my pocket." Also, in *Hibbert v. Shee* (d), it was held, that where goods are bought by sample, and the bulk does not agree with the sample, the purchaser is not bound either to accept or pay. This plea is in confession and avoidance,

(a) *Ante*, vol. 1, p. 60, N. S.;
 8 M. & W. 723.

(b) C. P., not yet reported.

(c) 1 B. & C. 1.

(d) 1 Camp. 113.

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for it admits the contract, and avoids it by collateral matter. The defendants, in substance, say, "it is true that we made the contract alleged, but when you tendered the hats, we demanded an inspection which you refused." If the tender alone had been traversed, the facts would have entitled the plaintiff to a verdict. *Smart v. Hyde*, and *Wyld v. Pickford (a)*, are authorities in favour of the plea.

PARKE, B.—The plea is bad; it is an argumentative denial that a tender was made. The obvious meaning of the declaration is, that the plaintiff was ready and willing to perform his part of the contract, and that he did all in his power to perform it, but that the defendant would not accept the hats when tendered. Then, the plea is not in confession and avoidance, but in answer, it proceeds to shew that according to the nature of the contract, the defendants were entitled to an opportunity of inspecting the hats on delivery. That they had such opportunity, is implied in the allegation of a tender having been made. The case is analogous to a tender of money which is not properly tendered when locked up in a box so that the party to whom it is shewn cannot open it or see the contents. There can be no doubt, therefore, that this plea amounts to an argumentative denial of the allegation in the declaration, that a tender had been made of these

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FIRTH v. BUCKINGHAM.

THIS was an action on a bill of exchange. The declaration stated the bill to have been drawn by one W. H. Thomas upon the defendant, and that the defendant by one H. Tribe, his agent in that behalf, accepted the same. The defendant pleaded that he did not accept the said bill, modo et formâ, upon which issue was joined. At the trial, the bill was produced, which purported to have been drawn on "The Directors of the Killerveris Consolidated Mining Company," of whom the defendant was one, and accepted on their behalf by H. Tribe, who was shewn to have a general authority to accept bills for them. It was objected on the part of the defendant, that the evidence did not support the issue, inasmuch as the question raised by it was whether or no the defendant by his agent accepted the bill, whereas the evidence was that Tribe accepted it for the directors of the Company, whose agent he was. The learned Judge overruled the objection, reserving leave for the defendant to move to enter a nonsuit.

A declaration on a bill of exchange stated, that defendant, by T., his agent, accepted the bill. The defendant pleaded that he did not accept modo et formâ. At the trial, the bill appeared to have been accepted by T., on behalf of the directors of a Mining Company of whom the defendant was one: *Held*, no variance.

Butt having moved accordingly,

The Court said that there was no ground for the application. Tribe had authority from the directors to accept bills for them, and a bill when accepted by him on their behalf became the bill of each and every of them.

Rule refused.



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BRISCOE v. HILL.

DEBT on simple contract.

To a plea of set-off, the plaintiff replied that except as to 97*l.* 12*s.* 4*d.*, parcel, &c., he was not, at the commencement of the suit, and at the time of pleading the plea, indebted *modo et forma*, and as to 97*l.* 12*s.* 4*d.*, parcel, &c., that before the pleading of the replication, the plaintiff had paid that sum into Court, in a cross-action brought against him, by the defendant, which said sum, the defendant took out of Court, in satisfaction,

Pleas; first, *nunquam indebitatus*; second, that the plaintiff, before and at the time of the commencement of this suit, was and from thenceforth hitherto has been and still is indebted to the defendant in 400*l.*, for goods, before then sold and delivered, and for work and labour and materials, and for money due on an account stated; which said sum of money in which the plaintiff was and is so indebted as aforesaid, exceeds the said debt due and owing from the defendant to the plaintiff, and the damages by the plaintiff sustained on occasion of the detention thereof, as in the declaration mentioned, &c.

Replication to second plea: that except as to the sum of 97*l.* 12*s.* 4*d.*, parcel of the said monies sought to be set off by the defendant in the said second plea, he, the plaintiff, was not at the time of the commencement of the suit, and at the time of the pleading the said second plea, indebted to the defendant in manner and form, &c., and this the plaintiff prays may be inquired of by the country. And as to the said sum of 97*l.* 12*s.* 4*d.*, parcel as aforesaid, the plaintiff says, that, though true it is that the plaintiff,

summons out of the Court of our Lady the now Queen, before the Barons of the Exchequer at Westminster, and directed to the now plaintiff, whereby our said Lady the Queen commanded the now plaintiff, that, within eight days after the service of the said writ, &c., he should cause an appearance to be entered for him in the said Court, in an action of debt at the suit of the now defendant, and which same writ was indorsed as follows: "The plaintiff claims 117*l.* 12*s.* 10*d.* for debt, and 2*l.* 4*s.* 4*d.* for costs;" and the said now plaintiff thereupon afterwards, to wit, on the 2nd May in the year aforesaid, in due time and manner did duly cause an appearance to be entered for him, &c., as by the record, &c.; and the now plaintiff further says, that the said writ so issued on the 22nd April as aforesaid, was issued and prosecuted by the now defendant, for the recovery of a certain sum then claimed by him to be due and owing to him from the now plaintiff, to wit, the sum of 117*l.* 12*s.* 10*d.*, which included the said sum of 97*l.* 12*s.* 4*d.*, parcel as aforesaid, which last mentioned sum was, at the time of the commencement of the said suit by the now defendant, actually due and owing from the now plaintiff to the now defendant, and in arrear and unpaid. The replication then went on to allege, that the now plaintiff having so entered an appearance, &c., the now defendant afterwards, and before the pleading of this replication, and before the now defendant pleaded in this action, to wit, on the 2nd May, in the year, &c., aforesaid, declared against the now plaintiff in the said suit, in debt for 200*l.*, for goods sold and delivered, in a like sum for work and labour, and in a like sum of money due on account stated. It then averred the identity of the sum of 97*l.* 12*s.* 4*d.*, parcel of the money sought to be set-off in the plea, with the like sum, parcel of the debt in the declaration in the former action; and went on to state, that after the now defendant had so declared against the now plaintiff as aforesaid, and after the now defendant

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had pleaded the second plea in this action, and before the pleading of this replication, to wit, on the 3rd July, 1842, the now plaintiff pleaded to the said action: first, except as to the sum of 97*l.* 12*s.* 4*d.*, parcel, &c., nunquam indebtedatus; second, as to 45*l.*, parcel, &c., and other than the said sum of 97*l.* 12*s.* 4*d.* and 45*l.*, payment before action brought; and lastly, as to 97*l.* 12*s.* 4*d.*, payment into Court. The replication then averred the identity of this last mentioned sum with the sum of 97*l.* 12*s.* 4*d.*, parcel of the money sought to be set-off in the present action, and alleged that the now defendant, before the pleading of this replication, replied to the above pleas of the now plaintiff, by taking the sum of 97*l.* 12*s.* 4*d.* out of Court, in full satisfaction, &c., and entering a nolle prosequi to the rest of the declaration, and averred the identity of the sum of 97*l.* 12*s.* 4*d.*, so taken out of Court in full satisfaction, &c., with the like sum now sought to be set-off, and that the plaintiff never was indebted to the now defendant to a greater amount than the said sum of 97*l.* 12*s.* 4*d.* in respect of the cause of action in the introductory part of the last mentioned plea; concluding with a verification.

To this replication, the defendant demurred specially, on the ground that it did not confess and avoid the cause of action pleaded in the set-off.

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plea of set-off, that the defendant had brought an action against the plaintiff for the debt which formed the subject of the set-off, and that the latter had paid the amount into Court. A defendant may plead by way of set-off, a verdict recovered by him against the plaintiff. *Baskerville v. Brown* (a). [*Parke, B.*—That case is not an authority in point. This replication is in effect a plea to the further maintenance of a cross-action, on the ground that since the commencement of the suit, the debt mentioned in the set-off has been paid, and, consequently, that the plaintiff is entitled to recover the amount he claims. The meaning of a plea of set-off is, that the plaintiff was and still is indebted to the defendant in a greater amount than his demand against the defendant; to make that defence available, it ought to be equally true at the moment of trial as at the time of pleading. The same question might have arisen before the New Rules, for in answer to proof of set-off under notice, the plaintiff might have shewn that it was since discharged by payment.] The replication is bad on another ground. A plea of set-off is one entire proposition, viz., that the plaintiff owes the defendant a larger sum than the latter owes the plaintiff. The plaintiff should, therefore, have replied to the whole, that he was never indebted; or, if he thought fit to plead as to part, that he was not so indebted, and as to the other part, payment, or judgment recovered; he should have framed his plea so as to enable the plaintiff to give a distinct answer to each part of his replication. This replication is improperly divided into two parts, and refers to two different periods; as to so much, the plaintiff says that he was not indebted to the defendant at the time of plea pleaded, concluding to the country; and as to the residue, satisfaction since obtained, concluding with a verification. If the plaintiff thought fit to plead payment as to part, he should

(a) 2 Burr. 1229.

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have averred, that the residue of the set-off did not exceed the debt and damages claimed in the declaration, and have concluded with a verification. Upon these pleadings, if the plaintiff should fail in proof of the latter part of this replication, the verdict of the jury on the issue raised by the former, would not determine the question of a set-off, because it would not appear that the amount due beyond the 97*l.* 12*s.* 4*d.*, exceeded the debt and damages claimed in the declaration.

Crompton. If either part of the replication be good, the plaintiff is entitled to judgment, as the demurrer is too large. In *Dowland v. Thompson* (a), it was held, that two parts of a plea of set-off are like two counts of a declaration, so that if either be good, a general demurrer to the whole is bad. *Vivian v. Jenkin* (b), is an authority to shew that the plaintiff may reply separately to different parts of this plea. But it is submitted, that both parts of the replication are good; as to 97*l.* 12*s.* 4*d.*, it affords a complete answer by shewing satisfaction, and as to the residue, it tenders an issue to the country. [*Parke, B.*—The objection is this, that the replication does not aver that the residue of the sum claimed by the set-off, exclusive of the 97*l.* 12*s.* 4*d.*, does not exceed the plaintiff's demand.] The plaintiff has concluded to the country, as if the affirmative

claim against the defendant; the replication says, that the balance, after excluding 97*l.* 12*s.* 4*d.*, does not equal the plaintiff's claim. Pleas of set-off have been held divisible, so that if part, together with other pleas, covers the plaintiff's demand, the defendant is entitled to a verdict on the whole record.

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PARKE, B.—The replication is bad. If the intention of the plaintiff was to deny that more than 97*l.* 12*s.* 4*d.*, was at any time due from him to the defendant, he should have framed his replication in such a way as to afford the defendant an opportunity of answering that allegation. On the record, as it now stands, there is no averment on the part of the defendant that the monies in the plea, exclusive of the 97*l.* 12*s.* 4*d.*, are sufficient to meet the plaintiff's demand. The plaintiff has replied, as if that fact were alleged, and, consequently, the replication is bad, inasmuch as there is no affirmative allegation on the one side met by an express negative on the other. If the plaintiff wishes to try the other portion of the replication, he may have leave to amend. Upon the subject of demurrers being too large, I see there is a very learned note by my brother *Manning*, to the case of *Hinde v. Gray* (a), which is entitled to considerable weight. There has been a case in the Queen's Bench, and another in the Common Pleas, where demurrers have been overruled as being too large; and the question is, is that practice right or not, and ought not the Court, on such demurrers, to give judgment on the whole record, according to the truth? If there be a general demurrer to two counts, one of which is good and the other bad, the plaintiff ought to have judgment on the good count and not on the bad. In short, the Courts should look at the whole record, and see what is the proper judgment to give upon the whole, otherwise

(a) 1 M. & Gr. 202.

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considerable difficulty may arise in the assessment of damages.

ALDERSON and ROLFE, B.'s, concurred.

Leave to amend, otherwise judgment
for Defendant.

FOWLER v. CHURCHILL.

The Court has jurisdiction to review an order absolute, charging stock under the 1 & 2 Vict. c. 110, ss. 14 & 15.

Where by the terms of a will, it is doubtful whether a defendant takes a beneficial interest, such order may be made, charging the stock conditionally.

IN this case, an order had been made charging stock under the 1 & 2 Vict. c. 110, ss. 14 and 15. It appeared that James Churchill, deceased, being entitled to certain government stock, made his will as follows:—I give and bequeath to my brother, George Churchill, for his natural life, the interest or dividend from 5000*l.* new 3½ per cent. government stock, which now pays a dividend at the bank of 175*l.*, this said dividend, or any other dividend that government may pay, shall be paid to him half-yearly, if convenient, for and during his natural lifetime, he shall never sell or part with this said interest or dividend in any way whatsoever during his lifetime until it has become due, and if he, the said George Churchill, should die, or become bankrupt, then this said dividend *shall be paid to*

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and share alike. No one of the said children shall be allowed, or shall ever sell or part with his or her share or interest in this said money until it shall be divided; if, on proof of any one or more having done so, then his or her share will, from that time, become the property of the other children, and when the said stock shall be sold, his or her share shall be divided between those other children who shall not have sold. This said stock to stand in the name of my executors, and if government shall reduce this said interest, then it must stand on the reduced stock." George Churchill died, leaving two children, one of whom was still a minor. The present action having been brought against the widow, and final judgment signed, the following order absolute was made by *Rolfe*, B. :—

"I do order that so much of the dividend only as is payable to Elizabeth Churchill for her sole use and benefit, arising from, and accruing due from the sum of 5000*l*., now standing in the books of the Bank of England in the names of, &c., trustees of Elizabeth Churchill, shall stand charged with the sum of 50*l*., being the amount of the judgment creditor's debt pursuant to the statute."

Petersdorff, on the part of the surviving trustees, moved to set aside the above order. It is questionable whether the Court has jurisdiction to review the order of a Judge under the 1 & 2 Vict. c. 110. The 14th section (a) enables

(a) Section 14, enacts, "That if any person, against whom any judgment shall have been entered up in any of her Majesty's Superior Courts, at Westminster, shall have any government stock, funds, or annuities, or any stock or shares of, or in any public company, in England, (whether incorporated or not,) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively, as he shall think fit, shall stand charged with the payment of the amount, and for which judgment shall have been so recovered, and interest thereon, and which order shall

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him to charge stock, &c., with the payment of debts, and the 15th section (a) provides, that the order shall be, in the first instance, an order nisi only, and shall operate as a

entitle the judgment creditor to all such remedies as he would have been entitled to, if such charge had been made in his favour by the judgment debtor: Provided, that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order."

(a) Section 15, "And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorized to be charged for the benefit of the judgment creditor, under an order of a Judge, be it further enacted, that every order of a Judge, charging any government stock, funds, or annuities, or any stock or shares in any public company under this act, shall be made in the first instance ex parte, and without any notice to the judgment

his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall, in like manner, restrain such public company from permitting a transfer thereof, and that if after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof, as may be sufficient to satisfy his judgment, and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the

distingas, and if no sufficient cause shall be shewn, the order shall be made absolute. No mention is made in either section of an appeal to the Court. In *Wilkinson on the Public Funds*, p. 344, two cases are cited, which shew that considerable doubt has existed on the point, and in *Brown v. Bamford (a)*, this Court decided that it had no original jurisdiction to make an order of this description.

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PER CURIAM.—Under the 3rd section of the same statute, the power to hold to bail is exercised by a single Judge, yet it is every day's practice to come to the Court by way of appeal.

Petersdorff then objected that it did not appear that the debtor had sufficient interest in the stock to bring the case within the statute. The power was given only where the person against whom judgment was entered up, had any government stock, funds, or annuities, or any stock or shares of, or in any public company in England, standing *in his name in his own right*, or in the name of any person *in trust for him*. By the terms of the will, Elizabeth Churchill did not take any beneficial interest in the stock, but was merely to lay it out for the good of her children. The 3 & 4 Vict. c. 82, which extends the provision of the former act, does not alter the case.

ALDERSON, B.—If the words “if any” had been inserted in the order, they would not have altered its effect. There is nothing in the order to prevent the Bank paying the money to the trustees, it only gives the creditor the power of going into the Court of Chancery, which he could not do unless he first obtained an order from a Judge, and restrains the trustees from paying over the money without considering the claim of the judgment creditor.

ROLFE, B.—When the parties were before me at Chambers, I thought they wished me to make an order which

(a) *Ante*, vol. 1, p. 361, N. S.; S. C., 9 M. & W. 42.

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might dispense with an application to a Court of Equity. Perhaps, however, I should not have objected to modify the order by charging the dividends payable for the sole use of Elizabeth Churchill, "if any."

Lord ABINGER, C. B., and PARKER, B., concurred.

Rule refused.

FROST v. HAYWARD.

An affidavit was entitled in the Exchequer, and the jurat stated it to be sworn before J. L., Master Extraordinary in the Court of Chancery: *Held*, bad.

Where there is a defect in the jurat of an affidavit, the Court will, in future, discharge the rule *with costs*.

THIS was an interpleader rule, calling on a third party to appear and state the nature and particulars of his claim, and maintain or relinquish the same.

Pashley appeared for the claimant, and objected to the jurat of the affidavit on which the rule was obtained. The affidavit was entitled "In the Court of Exchequer," and it purported to be sworn before "J. L., Master Extraordinary in the High Court of Chancery." It was submitted, that an affidavit entitled "In the Court of Exchequer," should appear to have been sworn before a commissioner of that Court. *Houlden v. Fasson (a)*, *Blackwell v. Allen (b)*, and *Shaw v. Perkin (c)*, are authorities to shew that the rule

judicial notice of the names of our commissioners. The rule must, therefore, be discharged, and with costs, to be paid by the party who has committed the error.

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PARKE and GURNEY, B.'s, concurred.

ROLFE, B.—In the case of *Blackwell v. Allen*, the Court discharged the rule without costs, on the ground that such had been the usual practice; but that seems to me, letting the one party off at the expense of the other, and imposing the costs of the error on the wrong person.

Rule discharged, with costs. (a)

(a) See *Sharpe v. Johnson*, ante, evidence of the particular person being a commissioner under the vol. 4, p. 324, O. S., where the C. P. held the list of the Chief Justice's clerk to be conclusive 3 & 4 Wm. 4, c. 42, s. 42.

SHATWELL v. HALL, LEE, PRIESTLY and BROADBENT.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing and converting his goods.

Two of the defendants pleaded not guilty by statute, and there were also pleas of justification under the 11 Geo. 2, c. 19 (a).

(a) Section 7, enacts, "That where any goods or chattels fraudulently or clandestinely conveyed or carried away by the tenant or tenants, lessee or lessees, his, her or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed or kept in any house, barn, stable, out-house, yard, close, or place, locked up, fastened, or otherwise secured, so as to prevent such

goods from being taken and seized as a distress for arrears of rent; it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other person or persons empowered to take and seize as a distress for rent such goods and chattels, (first calling to his, her, or their assistance, the constable, headborough, borsholder, or other peace officer of the hundred,

An Act for improving the town of Stalybridge, empowered commissioners to appoint constables for executing all such warrants as a justice of the peace should direct to be executed within the town, and the act required notice of action "for anything done in pursuance of it."

Held, that a constable appointed under the act, and directed by the warrant of a justice to enter

a house and seize goods under the 11 Geo. 2, c. 19, was not entitled to notice of action.

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At the trial, before *Gurney, B.*, at the last Chester Summer Assizes, it appeared that a tenant of Hall, being in arrear for rent, and the latter believing that the tenant's goods had been fraudulently removed to the plaintiff's cottage, authorized the defendant Lee to obtain a warrant to break open the cottage, and levy a distress on the goods. A warrant was accordingly obtained by Lee from a justice of the peace acting for the counties palatine of Lancaster and Chester, and the defendants Priestly and Broadbent were directed by the warrant to aid and assist. The two latter defendants were constables, appointed under 9 Geo. 4, c. xxvi., intituled, "An act for lighting, watching, and otherwise improving the town of Stalybridge, in the counties palatine of Lancaster and Chester, and for regulating the police thereof" (a). It was contended, that these two defendants were entitled to notice of action

borough, parish, district, or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein, and in case of a dwelling-house, (oath being also first made before some justice of the peace, of a reasonable ground to suspect that such goods are therein,) in the

stables for the said town, for promoting the good order thereof, and also, from time to time, to appoint a competent number of able bodied men as assistant constables of the said town, in keeping the peace therein, and for executing all such warrants, precepts, and orders, as the jus-

daytime, to break open, and

under the 179th section, which enacts, "that no plaintiff or plaintiffs shall recover in any action to be commenced against any person for anything done in pursuance of this act, unless notice in writing shall have been given to the defendant or defendants twenty-one days before such action shall be commenced, of such intended action signed by the attorney for the plaintiff or plaintiffs, specifying the cause of action," &c. The learned Judge overruled the objection, and the plaintiff obtained a verdict against all the defendants, except Hall. Leave having been reserved to move on behalf of the defendants, Priestley and Broadbent, to enter a nonsuit,

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Jervis moved accordingly, and urged, that as those defendants were constables appointed under the provisions of the 9 Geo. 4, c. xxvi., and were acting in obedience to a warrant from a justice of the peace, they were entitled to the protection given by the act. He referred to *Smith v. Shaw* (a), *Blakemore v. The Glamorganshire Canal Company* (b), *Wallace v. Smith* (c), and *Cook v. Leonard* (d).

Cur. adv. vult.

LORD ABINGER, C. B., delivered the judgment of the Court.—In this case there was a motion to enter a nonsuit, on the ground that two of the defendants were constables, appointed under an act of Parliament for the ancient town of Stalybridge, and that by virtue of that act, they were entitled to notice of action. Now, the action is not brought against them for anything done under the powers of the act of Parliament, but it was said that it was brought against them for something they did under the act, which gives them all the authority of constables; but the act done by them was not done in pursuance of the act of

(a) 10 B. & C. 277.

(b) 3 Y. & J. 60.

(c) 5 East, 115.

(d) 6 B. & C. 351.

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Parliament at all, and they were not entitled to notice in respect thereof, any more than any other constable would be. After consideration, we think that the act making them constables gives them a general jurisdiction, such as any other constable would have, when appointed by any other legal authority, and that it does not limit their authority as constables, to the execution of duties within the local ambit of the act. It makes the party a constable in the counties of Cheshire and Lancashire, in both of which the town of Stalybridge is situated, and he is entitled to all the privileges which constables appointed in any other manner would have, but who in the execution of their duties are not protected by the act of Parliament requiring notice previous to an action being brought. We think, therefore, that we ought not to grant a rule.

Rule refused.

TODD v. EMLY and Others.

In action for
 goods sold, a
 witness for the
 plaintiff having
 been objected
 to, on the

THIS was an action for wine supplied to the Alliance Club, of which the defendants were members of the committee.

At the trial, the plaintiff called as a witness another

A rule was afterwards made absolute to set aside the verdict, and to plead the plea, *nunc pro tunc* (a). Before the plaintiff replied, the witness cancelled the release by tearing off the seal, and the plaintiff then replied *non est factum*. The defendants rejoined "that the deed is the deed of the plaintiff," upon which issue was joined. The witness being called upon at the trial to produce the release, it appeared that he had delivered it to his clerk to give to the plaintiff, and that when applied to on the subject, he had referred the applicants to the plaintiff's attorney. The clerk of the witness not having been called, and the possession of the deed being thus unexplained, the learned Judge refused to receive secondary evidence of the contents of the instrument, and the plaintiff obtained a verdict.

A rule nisi for a new trial having been granted,

Platt and *Petersdorff* shewed cause. Supposing a new trial to be granted, the release, if produced, would not entitle the plaintiff to a verdict. The issue joined is, whether or no the deed is the deed of the plaintiff, and as the jury are bound to try the issue without regard to its validity, in point of law, they would be bound to find for the defendants, as the deed was not in existence at the time of the replication. Where, to debt on bond, *non est factum* was pleaded, and it appeared that before the trial, the bond and the labels of the seal had been eaten by mice, the jury were charged to inquire if it was the defendants' deed at the time of plea pleaded, *Nichols v. Haywood* (b), *Michael v. Scockwith* (c), and the third resolution in *Whelpdale's case* (d), are to the same effect. In *Fisher v. Ford* (e), a plea that the indenture "is not in the possession of the defendant," was held to refer to the

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(a) See the case, *Ante*, vol. 1, p. 598, N. S.; S. C. 9 M. & W. 606.

(b) *Dyer*, 59, a.

(c) *Cro. Eliz.* 120.

(d) 5 Rep. 119.

(e) 12 Adol. & E. 654; S. C. 4 P. & D. 347.

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time when the plea was pleaded. In all the Books on Evidence, it is stated that non est factum puts in issue, whether the deed be the deed of the party at the time of pleading, 1 *Phil. Evid.* 133, 2 *Stark. Evid.* 376. Perhaps, the replication may be open to objection on the ground that if the release was ever given, the debt was by it discharged, and the fact of its not being in existence at the time of trial, cannot revive the plaintiff's claim, but that point is not raised by the present rule. Besides, the cases to be found in the Books to the effect that an estate may pass, by a deed, although the deed be subsequently destroyed, are inapplicable as they refer to actions of ejectment, in which no specific issue is joined.

Thesiger, in support of the rule. The cases cited are distinguishable, because there, the actions having been brought upon the instruments themselves, it was necessary to prove them according to the terms of the issue. But in this case, the issue would have been proved by the production of the cancelled deed. A party need not make profert of a deed, to the possession of which he is not entitled, *Bain v. Cooper* (a). Nor where it is lost or destroyed, *Read v. Brookman* (b), *Master v. Miller* (c), *Bolton v. The Bishop of Carlisle* (d). But if a profert be pleaded, it is incumbent on the party to produce the deed. *Smith v.*

When a release is once executed, there is an end of the debt between the parties, and though the release is afterwards cancelled, it is still in existence as between third persons. In *Beckrow's case*, which was a question respecting a cancelled deed, is thus stated (a): "Beckrow intending to marry a widow, makes a conveyance by deed of feoffment of his land to several uses, by which he settled his land upon the issue of the feme, having issue by a former wife. But, after the marriage, he, by much importunity, procured the deed of a conveyance into his own hands, out of the custody of the wife; and also, an obligation which makes mention of it, and it was for performance of covenants, and then he cancelled the deed and the obligation, and took off the seal from them, and afterwards settled his land upon his former children, and dies, (having issue by his last wife). And, in actions under these conveyances, it was permitted by the Court that the cancelled deed should be read in evidence. But first, there should be testimony given of the truth of that practice before it should be read, &c." In *Woodward v. Aston* (b), a question arose as to whether the estate in the office of clerk of the papers was destroyed by the cancellation of the deed of grant, and the Court said that a rent or other grant was not lost by the destruction of the deed, as a bond or chose in action was, *Dennis v. Payne* (c).

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PARKE, B.—We think, that under the circumstances, that the defendants are entitled to a new trial on payment of costs, on the ground of surprise.

Rule absolute accordingly.

(a) Hetley, 138.
 (b) 1 Vent. 296.

(c) March. pl. 165, n. 5.

COURT OF COMMON PLEAS.

Michaelmas Term.

IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

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The retainer or appointment of an attorney by a corporation, must be by common seal.

Where an attorney, who was town-clerk of a municipal borough duly appointed under seal, acted also as attorney of the corporation, in various suits at law and in

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THIS was an action of debt, brought by the plaintiff, an attorney, to recover from the defendants divers sums of money, alleged to be due from them. The first count of the declaration claimed 3711*l.* 2*s.*, due for the work, labour, care, diligence, journeys, and attendance of the plaintiff, by him done and performed, as the attorney and solicitor of the defendants, and at their request, and for fees due, and of right payable to the plaintiff in respect thereof, and for materials and necessary things by the plaintiff provided in and about the said work and labour for the defendants, and at their request; the second count was for 3000*l.*, for

on an account stated. Pleas, first, as to all except 100*l.*, never indebted; secondly, that the plaintiff had not delivered a signed bill before action brought; thirdly, as to all except 100*l.*, payment; fourthly, as to 500*l.*, parcel, &c., except the said sum of 100*l.*, a set-off; fifthly, as to 100*l.*, payment into Court. Replication, joining issue on the first plea; *de injuriâ*, as to the second plea; as to the third and fourth pleas, a traverse; and as to the fifth plea, acceptance of the money paid into Court. Issue.

The cause went down for trial at the Summer Assizes for the county of Dorset, on the 20th of July, 1840, when, by the consent of the parties, a verdict was entered for the plaintiff for 500*l.* damages, 10,622*l.* 4*s.* 0*d.* debt, and 40*s.* costs, subject to the award of a gentleman of the Bar, to whom all matters in difference comprised in ten bills (hereafter particularized), forming the particulars of the plaintiff's demand, were referred, who was authorized to direct how the verdict should be finally entered, and who was also authorized, if he thought fit, to state facts, and make an interlocutory award or awards at the request of either party, for the purpose of taking the opinion of this Court on any point or points; the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator.

On the 7th of June, 1841, the arbitrator made his award. Having recited the order of *nisi prius*, he proceeded, "I do award and order that the verdict found for the plaintiff be set aside, and, instead thereof, I do direct as to the issue joined upon the plea of the defendants, by them first pleaded, that a verdict be entered upon that issue for the plaintiff, damages, 1*s.*; debt, 718*l.* 1*s.* 7*d.*, subject to the opinion of the Court upon the points hereinafter reserved, the amount of debt for which it is so entered to be increased or reduced by such sum or sums as are hereinafter specified; and as to the issue joined upon the replication of the plaintiff as to the plea of the defendants, by them secondly pleaded, I do direct a verdict

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to be entered for the plaintiff; and as to the issues severally joined upon the replication of the plaintiff to the pleas of the defendants, by them thirdly and fourthly pleaded, I do direct a verdict to be entered for the plaintiff upon the same, and I hereby state the following facts to be submitted for the opinion of the Court:—

“The action was brought by the plaintiff, an attorney, and town-clerk, and clerk of the peace of the borough of Poole, to recover the amount of several bills. The action was commenced in June, 1840; the claim of the plaintiff consisted of charges and disbursements for business done by him, as an attorney, in divers suits and other matters, at various times from the year 1836, until the year 1840, and also, for business done by, and fees and salary due to him, as such town-clerk and clerk of the peace.

“The plaintiff was appointed town-clerk and clerk of the peace under the seal of the corporate body, in January, 1836, at an annual salary of 100*l.* for his ordinary business, and was town-clerk of the borough during all the time when the business for which this action was brought was done. The borough of Poole is an ancient body corporate, and one of the boroughs regulated by, and included in, schedule A. of the statute 5 & 6 Wm. 4, c. 76. The charges were contained in ten separate bills, and were for business done, and disbursements made, under the follow-

election of councillors, and other corporate officers of the borough, and afterwards, on the report of the said committee, a bill was introduced into the House of Commons for the purpose of avoiding the said election, on the grounds of fraud and illegal practices. This bill passed the House of Commons, and was subsequently rejected in the House of Lords; the charges contained in bill, No. 1, were for disbursements and business done by the plaintiff in opposing the motion for the appointment of the said select committee, and the bill so introduced into the House of Commons. The plaintiff had received no authority from the corporation to take any proceedings in the above matter; the propriety of such proceedings had not been proposed or considered at any regular meeting of the town council, nor had any meeting of the town council been summoned for that purpose; there was no memorandum or resolution in the minute book of the town council, authorizing any of these proceedings. The plaintiff had received orders from the mayor for the time being, and from other members of the town council to take all necessary steps to oppose the measures in Parliament; several meetings were held at the town-clerk's office, where the majority in number of the town council attended, and instructed the plaintiff to oppose the said bill in Parliament, but the members of the town council generally had not been summoned to attend such meetings, nor did they attend. The members summoned were those only who were known to be favourable to an opposition to the bill. The charges were for business done between February and the 2nd of August, 1836. On the 3rd of August, the following resolution was passed at a quarterly meeting of the town council, and entered in the minute book, 'Resolved unanimously, that the thanks of this meeting be presented to the Right Honourable Lord Lyndhurst, Lord Redesdale, and the other noble Peers, for their powerful efforts in rejecting the unconstitutional bill attempted to be passed for the destruction of this council;' a similar resolution was then set out, of thanks

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to certain members of the House of Commons, for their opposition to the bill, and then a unanimous resolution of the meeting, 'That the mayor be requested to forward a copy of the above resolutions to each of the noble lords, and honourable members, under the seal of this council.'

"The bill, no. 2, was headed, 'Bill of Costs incurred in opposing a rule for a mandamus as to the inspection of Voting Papers.' The amount of these charges was 141*l.* 11*s.* 10*d.* After the municipal election in 1835, the voting papers for that year were deposited with the plaintiff, as town-clerk. A complaint was made as to the mode in which the town-clerk allowed the burgesses to inspect the voting papers, and a rule was obtained in the Court of Queen's Bench, calling on the plaintiff to shew cause why a mandamus should not issue, commanding him to permit certain burgesses to inspect the voting papers. The rule was discharged by arrangement. The plaintiff had received no authority under the seal of the corporation to take any steps in the matter, nor was there any entry or resolution in the minute-books of the town council, directing the plaintiff to take any proceedings. He had received no orders from the then mayor to oppose the rule, and the costs were incurred in opposing it. The business was done between January and May, 1836. The following resolutions and orders were passed at meetings of, and entered in

1000*l.* 13*s.* 5*d.*, be taxed. It is ordered, that the sum of 500*l.* be paid to the town-clerk by the treasurer, on account of his bills delivered.'

'7th August, 1839.

'Resolved, that the sum of 150*l.* on account of the check of 500*l.*, dated the 1st day of May last, be paid by the treasurer to the town-clerk.'

"The report of the finance committee above referred to, was as follows:—

'28th January, 1839.

'The committee having examined the outstanding accounts due by the council for the year, ending 9th November, 1838, find the following orders on the treasurer outstanding, viz:—

'Town-clerk for sundry law bills, 1000*l.* 13*s.* 5*d.*

'The committee offers no observations on the law bills delivered in by the town-clerk, and recommend the same to the consideration of the council.'

"The above bill of 141*l.* 11*s.* 10*d.* was included in the bills amounting to 1000*l.* 13*s.* 5*d.*, mentioned in the above report, and had been duly delivered to defendants, signed by the plaintiff as required by statute, on or before the 28th of January, 1839. The other bills delivered, to which the above report refers, were bills, Nos. 3, 4, 5, 6, and 7, and hereinafter mentioned. An order for the payment of 500*l.* on account of the bills so delivered was given to the plaintiff, and at the time of the bringing of this action, 350*l.* out of the 500*l.* so ordered, had been paid to the plaintiff by the treasurer of the borough.

"The Bill, No. 3, was headed, 'Costs and Expenses incurred in the matter of the Municipal Charities in the borough of Poole.' A signed bill of these costs had been duly delivered to the defendants on or before the 28th of January, 1839. An application had been made to the Court of Chancery, on the petition of certain councillors of the borough of Poole, to appoint trustees of the corporation charity estates, and a counter-petition had been

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presented by three councillors of the borough, praying that they might be admitted to take part in the proceedings, which had been referred to the Master. The whole amount of the bill of costs of the counter-petitioners was 184*l.* 6*s.* An order of the Court of Chancery was made, whereby it was ordered, that the costs, both of the petitioners and counter-petitioners, should be taxed and paid out of the charity funds. The taxed costs of the counter-petitioners amounted to 108*l.* 18*s.* 11*d.*, of which the plaintiff had received 55*l.* before the commencement of this action. The claim in this action was for 82*l.* 7*s.* 1*d.*, the residue of the above bill of costs. The business was done between September, 1836, and January, 1837. There was no authority given to the plaintiff under the seal of the corporation, but the following resolution was passed at a meeting, and was entered in the minute-book of the town council.

'7th September, 1836.

‘Resolved unanimously, that Mr. Thomas Arnold, the town-clerk of this borough, be authorized to take such steps as may be advised by counsel, with reference to a petition to the Lord Chancellor by G. S. P. and W. G., two of the members of this council, for the appointment of trustees of several of the charities in Poole, without previously conferring with this council thereon; and that the town-clerk

in Chancery, between her Majesty's Attorney General, at the relation of the Right Honourable F. W. S. Ponsonby and others, and the mayor, aldermen and burgesses of the borough of Poole, Robert Henning Parr and Thomas Arnold. The object of the suit was to call in question the right of the said R. H. Parr to certain compensation which had been granted him on his removal from certain borough offices, and to cancel a bond given by the said corporation of Poole, as a security for such compensation, on the ground that the compensation was illegal, and the bond fraudulent and void. A charge of fraud was made in the information filed in this suit against the corporation. The amount of the claim was 340*l.* 19*s.* 3*d.*, and was for business done between the 13th of November, 1837, and November, 1838, A signed bill of these costs had been duly delivered before the commencement of the action.

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"Bill, No. 8, was a bill of costs in the last mentioned suit for business done from November, 1838, to September, 1839. A signed bill of the costs had been duly delivered before the commencement of this action. The amount of bill, No. 8, was 454*l.* 6*s.* 6*d.* The plaintiff had received no authority under the seal of the corporation to take the proceedings in this suit, but the following resolutions were passed at meetings, and entered in the minute-book of the town council.

'17th November, 1837.

'The mayor and town-clerk having been served with a Chancery subpoena, commanding them within eight days to appear to an information filed by her Majesty's Attorney General, at the relation of the Honourable F. W. S. Ponsonby and others. Resolved unanimously, that the town-clerk be authorized to enter an appearance for the council and himself to such information, and obtain an office copy thereof, and he is also authorized to retain counsel, and to take such steps as may be necessary in defence of this council and himself, and for answering such information.'

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‘7th February, 1838.

‘Resolved, that the instructions given by the mayor to the town-clerk, on an appeal to the Lord Chancellor against the judgment of the Master of the Rolls, in the case of *The Attorney General, on the relation of the Honourable F. W. S. Ponsonby and others* against *The Corporation of Poole*, be confirmed.’

‘24th November, 1838.

‘Resolved, that the town-clerk do suspend proceedings in the cause of *The Attorney General v. The Corporation of Poole*, till further instructed by the council, and that his bills in the above suit be made up to this date, and referred to the finance committee for their report at the next meeting of this council.’

‘6th February, 1839.

‘Resolved, that the report of the finance committee as now read, be adopted.’

‘Resolved, that the town-clerk be authorized to prepare the necessary instructions for answering, by the corporation and himself, the information as amended, filed against the corporation by the *Attorney General, on the relation of the Honourable W. F. S. Ponsonby and others.*’

‘22nd February, 1839.

‘Resolved, that the town-clerk be directed to forward the several minutes and answers prepared this day to the

formation filed against them, by, &c., and that the mayor be authorized to affix the seal of the corporation of the borough thereto, on being engrossed.'

'10th September, 1839.

'The draft of the further answer, and of the answer to the supplemental bill of *The Attorney General v. The Corporation*, was read and explained to this meeting, preparatory to being engrossed.'

'6th May, 1840.

'Resolved, that the report of the finance committee now read, be received.'

"The report read, was as follows:—

'5th May, 1840.

'The committee also beg to report that the following bills have been delivered by the town-clerk, amounting to the sum of 1547*l.* 5*s.* 6*d.*: And your committee finding that they have been frequently laid before the council, recommend that some decisive steps be taken for disbursing the same.'

'Amongst the bills so referred to, were the above-mentioned bills, No. 4, of 347*l.* 19*s.* 3*d.*, and No. 8, of 454*l.* 6*s.* 6*d.* The sum of 100*l.* voted to the plaintiff, by the above resolution, was paid to him. The above information had been filed in the Court of the Master of the Rolls, and an appeal was had from his judgment thereon, to the Lord Chancellor, the suit is not determined, but is still pending on an appeal to the House of Lords; the plaintiff is still the solicitor in the suit. It was not proved that he had given any notice to the defendants of an intention not to go on with the suit.

"The Bill, No. 5, was a bill of costs, in defending an action at law brought in December, 1837, by *R. H. Parr* against *The Corporation of Poole*, to recover an instalment of interest due on a bond given by the corporation to the said *R. H. Parr*, to secure certain compensation granted to him on his removal from certain borough offices. The attorney on the record on behalf of the corporation, was

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Mr. Weller, who was the town agent of Mr. Arnold, the town-clerk. The plaintiff had received no authority under the seal of the corporation to defend the action, but the following resolutions were passed at a meeting, and entered in the minute-book of the town council:—

‘30th December, 1837.

‘The mayor having been served with a writ issued out of her Majesty’s Court of Common Pleas by *R. H. Parr* against *The Mayor, Aldermen, and Burgesses of the Borough*, claiming the sum of 1350*l.*, being the first instalment due to the said *R. H. Parr*, on a bond executed by the council, dated the 29th of November, 1836, for compensation, with interest thereon, and the town-clerk having entered an appearance for this council at the request of the mayor: Resolved, that the same be hereby confirmed.’

“A signed bill of these costs was delivered in January, 1839, and was one of those included in the report of the finance committee of the 6th of February, 1839. The amount was 65*l.* 8*s.*, and was for business done between December, 1837, and March, 1838.

“The Bills, No. 6 and 9, were for business done at sessions.

“The Bills, No. 7 and 10, were for general business as town-clerk. These Bills, Nos. 6, 7, 9 and 10, had been signed and duly delivered before the commencement of this

enable the plaintiff to maintain this action in respect thereof against them.

“And as to the Bills, Nos. 2, 3, 4, 5, and 8, I find that the above facts do not furnish evidence of a retainer of the plaintiff by the defendants, and of right of action in respect of the matters contained in the last-mentioned bills, so as to enable the plaintiff to maintain this action, in respect of the same or either of them against the defendants.

“And as to the Bills, Nos. 6, 7, 9, and 10, I find that, after allowing all just deductions and payments, there is due and owing from the defendants to the plaintiff, in respect thereof, the sum of 718*l.* 9*s.* 7*d.*, which sum of 718*l.* 9*s.* 7*d.*, is the debt for which I have directed the verdict to be entered as above mentioned.

“And as to the sum of 350*l.* paid to the plaintiff, in pursuance of the resolution of the 1st of May, 1839, on account of the Bills, Nos. 2, 3, 4, 5, 6, and 7, I find that the plaintiff applied part of that sum in satisfaction of the Bills, Nos. 2, 3, and 6, amounting, in the whole, to 283*l.* 16*s.* 10*d.*, and the residue of the said sum, amounting to 66*l.* 13*s.* 2*d.* in part satisfaction of the Bill, No. 7, and I have, in estimating the debt, for which I have directed the verdict to be entered, so appropriated the said sum of 350*l.*

“And I do hereby submit the following questions for the opinion of the Court:—

“First, whether the facts above stated, furnish sufficient evidence of a retainer of the plaintiff, to enable him to maintain this action in respect of the charges contained in the Bill, No. 1, against the defendants.

“Secondly, whether in the absence of any authority under the seal of the corporation, the above facts furnish evidence of a valid contract or retainer, binding the corporation, so as to enable the plaintiff to maintain this action for the whole or either of the bills, Nos. 2, 3, 4, 5, and 8, against the defendants.

“Thirdly, whether the charges in the Bills, Nos. 1, 2,

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3, 4, 5 and 8, were for matters concerning which the corporation could enter into a valid contract, or give a retainer, binding the funds of the corporation, so as to enable the plaintiff to maintain this action in respect of such bills, or any of them, against the defendants.

“Fourthly, whether the plaintiff had any right of action against the defendants to recover the charges contained in the Bills, Nos. 4 and 8, the suit to which they referred being undetermined.

“Fifthly, whether the plaintiff had a right to appropriate the payment of two sums, namely 141*l.* 11*s.* 10*d.* and 82*l.* 7*s.* 1*d.*, part of the said sum of 350*l.*, to the Bills, Nos. 2 and 3 respectively.

“If the Court should be of opinion that the facts above stated, furnish sufficient evidence of a retainer of the plaintiff, and of a right of action, so as to enable him to maintain this action, in respect of the charges contained in Bill, No. 1, against the defendants, and that the said bill was for matters, concerning which the corporation could, by such retainer, bind the funds of the corporation, I direct the debt, for which I have ordered the verdict to be entered, to be increased by the amount of the said Bill, No. 1.

“If the Court should be of opinion, that the facts above stated, in the absence of any authority given to the plaintiff under the seal of the corporation, to do the work and busi-

of any authority given to the plaintiff, under the seal of the corporation, to do the work contained in the Bill, No. 5, the facts above stated, furnish evidence of a retainer or valid contract, binding the corporation in relation to the matters contained in the said bill, and that the same was for matters concerning which the town council had power to make a valid contract, or give a retainer, binding the corporation, then I direct the debt, for which I have ordered the verdict to be entered, to be increased by the amount of the said last-mentioned bill.

“If the Court should be of opinion, that the facts above stated, in the absence of any authority given to the plaintiff under the seal of the corporation, to do the work contained in the Bills, Nos. 4 and 8, furnish evidence of a retainer or valid contract, binding the corporation in relation to the matters contained in the said last-mentioned bills, or either of them, and that the same were for matters concerning which the town council had power to make a valid contract or give a retainer, binding the corporation, and also that the plaintiff had a right of action to recover the same, or either of them, notwithstanding the suit to which they refer had not been determined, then I direct that the debt for which I have ordered the verdict to be entered, to be increased, by the amount of such bill or bills, deducting therefrom the sum of 100*l.* paid to the plaintiff in pursuance of the resolution above mentioned, on account of the said bills.”

The arbitrator further directed that the costs of the reference should be paid in equal moieties by the plaintiff and the defendants.

The case having been set down in the special paper, in Easter Term, 1842, came on for argument upon the questions submitted for the opinion of the Court, by the arbitrator.

Bompas, Serjt., (with whom was *Barstow*.) for the plaintiff. The first and material question which presented itself

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upon the whole case, was, whether a valid contract of retainer of an attorney, could be made by a corporation, such contract not being under seal; and it was submitted, that under the circumstances disclosed in the finding of the arbitrator, the plaintiff had been retained by valid acts of the corporation, so as to give him a right of action for his costs, incurred by him in the capacity of attorney to the defendants. From *Com. Dig.* tit. "*Attorney*," it was to be collected that the appointment of an attorney might be of a general character, and that where he appeared for a corporation, it was not necessary that he should be authorized by deed under seal in each case, and in *Com. Dig.* tit. "*Franchises*," (F 13), *Bro. Abr.* tit. "*Corporations*," (pl. 49,) and in *Vin. Abr.* tit. "*Corporation*," (K 16,) were stated many acts of inconsiderable importance, which it was competent for a corporation to perform, without seal (a.) That a seal was not in every case requisite, was obvious, for every year the lord mayor of London appointed the attorney of the corporation in this Court, without seal. [*Tindal*, C. J.—That is done by the recorder in the presence, and as the mouthpiece and representative of the corporation, and it is entered of record. *The Mayor of Thetford's case* (b).] The very general and broad propositions which appeared to have been acted upon in former times, had already received considerable modifi-

perceived that they must necessarily be upheld, for the policy of modern times was to simplify the practice of the law. The argument now raised, was considerably advanced by those decisions which had gone the length of determining that a corporation might sue and be sued upon simple contracts. Thus in *The Barber Surgeons' Company v. Pelson* (a), it was held, that a corporation may maintain assumpsit, for money forfeited on a bye-law; in *The Dean and Chapter of Rochester v. Pierce* (b), it was determined that debt lies by a corporation for use and occupation, and that case was confirmed and recognised in *Smith v. The Birmingham Gas Company* (c), where it was held that a corporation is liable, in tort, for the tortious act of its agent, though not appointed by seal, if such act be an ordinary service. In *The Mayor of Stafford v. Till* (d), it was held, that if the contract be executed, a corporation aggregate may sue, though the contract was not by deed. In *The East London Waterworks Company v. Bailey* (e), where the directors of an incorporated company were authorized, by act of Parliament, to "make contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons employed or concerned in making, completing, or continuing the works belonging to the said undertaking," it was held, that the company could not recover in assumpsit for the non-delivery of certain pipes, which the defendants, by contract not under seal, had agreed to deliver, but *Best*, C. J., in his judgment, admitted that there was an exception to the general principle in the case "where the acts done were of daily necessity to the corporation (f)." This case, as well as *Dunston v. The Imperial Gas Company* (g), had lately come under the consideration of the Court of Queen's Bench, in *Beverley v.*

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(a) 2 Lev. 252. Vide also *City of London v. Goree*, 1 Vent. 298, S. C. 2 Lev. 174.

(b) 1 Camp. 466. Vide also 2 Camp. 96.

(c) 1 Ad. & El. 526; 3 N. & M. 771.

(d) 4 Bing. 75.

(e) 4 Bing. 283; 12 Moore, 532.

(f) Referring to Bro. Abr. tit. "Corporations and Capacities," pl. 56, and *Horn v. Ivy*, 1 Vent. 47.

(g) 3 B. & Ad. 125.

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The Lincoln Gas Light and Coke Company (a). There, it was held, that a corporation aggregate may be sued in *indebitatus assumpsit*, for goods sold and delivered, though the contract be not under seal, and that the contract may be implied or express, as in cases of *assumpsit* against an individual, and *Patteson, J.*, who delivered the judgment of the Court, entered into a lengthened argument, from which it was submitted, that the result to be drawn was, that the rule which gave corporations the power to sue upon simple contracts was mutual, and rendered them liable to be sued upon like agreements. *Church v. The Imperial Gas Light and Coke Company* (b), extended the principle contended for; there, it was decided, that a corporation, created for the purpose of supplying gas, may maintain *assumpsit* for breach of a contract by the defendant, to accept gas from year to year, at 12*l.* 16*s.* per annum., the consideration being alleged to be the promise of the plaintiffs to supply it on those terms; and that such promise by the company, though not under seal, is valid, and a good consideration, and that it makes no difference as to the right of a corporation to sue on a contract entered into by them without seal, whether the contract be executed or executory. *The Mayor of Ludlow v. Charlton* (c), where it was held, that a municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds

Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, ss. 76 to 79, it appeared that the Legislature had by no means contemplated the necessity of having recourse to the common seal upon every occasion, for by those sections, large powers were given to the common council, who had no common seal, and every desire appeared to be evinced to render the discharge of their duties as plain and intelligible as possible. The convenience of the public, it was submitted, would be favoured by the adoption of a course less strict, than that which ancient authority seemed to require. To proceed now to the various bills of costs. It was admitted that the claim for Bill, No. 1, could not be supported, for that the transaction of the business, which formed the subject matter of that bill, had not been sanctioned by the corporation generally, or by any sufficiently authorized portion of its members. Bills, numbered 2, 3, 4, 5, and 8, were in respect of business done on behalf of the corporation, in Courts of law and equity, and their aggregate amount was 748*l.* 13*s.* 5*d.* No. 2, was for business done in opposing a rule for a mandamus, to inspect certain voting papers (a); it was the duty of the corporation to see that these papers were properly managed, and although the opposition to the rule might fall within the routine of business of the town-clerk, the extra costs incurred, formed the subject of a separate and valid demand on his part, against the corporation. His acts had been acknowledged by the town council, and a sum of money had been paid on account. Bill, No. 3, rested upon the same grounds; for there had been specific directions given by the town council, for the proceedings which had been taken in Chancery, in reference to the municipal charities of the borough, and a subsequent recognition and acknowledgment of the plaintiff's services. This bill, as now claimed, amounted to 82*l.* 7*s.* 1*d.*, a sum of 55*l.* having been received out of the estate, by order of the Court of Chancery, in reduction of its original amount.

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(a) See the case of *Rex v. Arnold*, which forms the subject of the charges in this Bill, reported in 4 Ad. & El. 657; S. C. 6 N. & M. 152.

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In these proceedings, the corporation had been compelled to appear by attorney, and the Court would not now allow them to repudiate their own acts. The items in Bills, Nos. 4 and 8, were also in respect of business transacted in Chancery, by the express direction and authority of the town council, respecting a compensation deed given by the corporation to Mr. Parr, and nothing could be stronger than the resolutions arrived at, directing these proceedings, and subsequently acknowledging them. Bill, No. 5, was, in respect of the defence of an action at law, by the same individual, and rested upon the same grounds of general employment and recognition. Bills, Nos. 6, 7, 9, and 10, were those, in respect of which the arbitrator had directed that the plaintiff was entitled to a verdict. With regard to Bills, Nos. 2, 3, 6 and 7, the arbitrator had also found that a sum of 350*l.* had been paid in reduction of their amount, and he had awarded that the plaintiff had applied a portion of that sum in payment of Nos. 2, 3, and 6, and the residue, amounting to 66*l.* 13*s.* 2*d.*, in part payment of No. 7. It could hardly be contended by the defendants, that this finding was not correct; or that the plaintiff was not so entitled to appropriate the money which he had received. With regard to Bills, Nos. 4 and 8, another question arose, namely, whether the suit, in respect of which those charges were made, being still pending, the plaintiff was entitled to

when he discovered that he could not succeed, *Lawrence v. Potts* (a). In the present case, the town council, by the resolutions of the 24th of November, 1838, had required the plaintiff to furnish his bills of costs, and had declared their intention to suspend the suit, and where such a state of facts existed, the attorney could hardly be expected to carry on the suit at his own peril. With reference to the general power of the corporation to enter into contracts with the plaintiff; it was argued for the defendants that they could not make agreements such as those which were sought to be set up, for that they were merely trustees. If any illegality of proceeding on their part was intended to be relied upon, it ought to have been specially pleaded. But even supposing that the objection might be raised, it was not tenable. *The Attorney General v. The Mayor of Norwich* (b), *Regina v. The Mayor of Bridgewater* (c), and *Holdsworth v. The Mayor of Dartmouth* (d), were referred to.

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Channell, Serjt., for the defendants. The material question to be considered was, whether a municipal corporation could be bound, by any promise of payment, to a person in the capacity of their attorney, such promise not being the subject of a contract under seal. It would not be necessary, at this time, to give very full consideration to the older authorities upon this subject, because the same text-books were almost invariably referred to in all cases of recent occurrence; and it would be found that the cases in which the old rule of strictness had been departed from, were cases referring to trading corporations, empowered by act of Parliament to assume the position of corporate bodies, for the purpose of facilitating the conduct of their trade, and where, therefore, to maintain the strict rule of law, would be to throw difficulties in their way, and to oppose the intentions of the Legislature. Of such a nature

(a) 6 Carr. & P. 428.

D. 558.

(b) 2 Myl. & Cr. 406.

(d) 11 Ad. & El. 490; 3 P. &

(c) 10 Ad. & El. 281; 2 P. &

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were the cases of *The East London Waterworks Company v. Bailey*, *Church v. The Imperial Gas Company*, *Beverley v. The Lincoln Gas Company*, and many others which had been already referred to. That a distinction must be drawn between corporations of such a character and the present, however, was obvious, as well from ancient authority as from the peculiar duties and obligations under which such a corporation rested; and in the case of *Gibson v. The East India Company* (a), this distinction was clearly recognised in this Court, in the judgment delivered by *Tindal*, C. J. The Court of Exchequer in the case of *The Mayor of Ludlow v. Charlton* (b), sanctioned the same distinction, and the authority of that case was decisive in favour of the defendant's argument here. The rule deducible from that case was, that a corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the corporate seal; and in the judgment of the Court, delivered by *Rolfe*, B., the principle now contended for was broadly stated. It was true, that in the old cases, some exceptions were to be found engrafted on the general rule, which shewed that in matters of constant recurrence, of small importance; or which admitted of no delay, the strict rule might be departed from; but the appointment of an attorney was a matter which came

contended, that the authority of the plaintiff, as attorney for the defendants, was recognised, at all events in the action, by Mr. Parr, because his agent was the attorney on the record. This, however, was no appointment by matter of record; for the preparation of the record in the action was the act of the attorney himself, *Bac. Abr.* tit. "*Corporations*," (E 3) was referred to. [*Tindal*, C. J.—The plaintiff can hardly rely on the appointment of the attorney of the city of London by record; that is an insulated custom, which has existed from the earliest time; and even that is not a general appointment, but an appointment only to prosecute and defend all the franchises, privileges, and rights of the city of London.] Then, with regard to the various bills comprised in the present action. With regard to Bill, No. 2, there was no retainer, but a ratification only of the acts done by the plaintiff. It might be a question besides, whether the subject matter of this bill was one on which the plaintiff was entitled to make any claim. His office was that of town-clerk, and the question was, whether he was not bound to perform the duties of his office correctly, and whether, if he committed an error, he must not bear the consequences? Bills, Nos. 3 and 5 rested upon the same grounds. With regard to Bills, Nos. 4 and 8, the rule was distinct that an attorney could not recover his bills of costs, unless by a proper notice to his client, he abandoned the conduct of the suit. *Harris v. Osbourn* laid down the rule broadly, that the contract of the client was to pay at the completion of the suit, and that unless the contract was defeated by reasonable notice, the attorney, before that time, had no cause of action. In reference to the question of the appropriation of the sum of 350*l.*, to the Bills, Nos. 2, 3, and 6, it was urged that with regard to the two former Bills, at all events, this appropriation could not be sustained; for if the plaintiff had no cause of action on those bills, by reason of the absence of any sufficient retainer, he had no right to appropriate the money which he had re-

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ceived in reduction of their amount, but that money must be applied in diminution of the amount awarded by the arbitrator.

Bompas, in reply.

Cur. adv. vult.

TINDAL, C. J.—This was an action of debt, brought by an attorney, who was town-clerk, and clerk of the peace of the borough of Poole, to recover from the corporation of the mayor, aldermen, and burgesses of Poole, the amount of ten several Bills of costs numbered from 1 to 10. By an order of *Nisi Prius*, the cause was referred to an arbitrator, who found, as to all the bills except those numbered 6, 7, 9 and 10, that the plaintiff had no retainer under the common seal of the corporation, and decided that he could not recover; as to the Bills numbered 6, 7, 9 and 10, he found that the business therein mentioned was done by the plaintiff in his capacity of town-clerk, and clerk of the peace, and directed that a verdict should be entered in his favour for 718*l.* 9*s.* 7*d.*, which he found to be due in respect of those bills. He also found that after all the bills had been delivered, money was paid on account generally by the corporation, and that the plaintiff had applied a portion of it to the Bills numbered 2 and 3; and he stated

But as to the residue of the bills disallowed by the arbitrator, it was contended that the facts appearing on the face of the award, were sufficient to prove a valid retainer, although not under the common seal of the corporation, and several instances were pointed out, in which it has been held, that corporations aggregate, having a head, may, by parol, appoint servants for the performance of certain acts on their behalf. But the acts which may so be done, have always been considered as exceptions out of the general rule of law, and relate either to trivial matters of frequent occurrence, or such as from their nature do not admit of delay. Cases were also cited, in which actions founded on simple contracts, have been maintained by, and against, corporations aggregate. These instances are for the most part modern, and relate to corporations established for particular purposes, and where the making of such contracts was essential for carrying those very purposes into execution. For some time it was considered that such actions could be maintained on executed contracts only, but in *Church v. The Imperial Gas and Coke Company (a)*, the same principle was extended to actions on executory contracts. These two classes of cases, viz., those relating to the appointment of servants by corporations aggregate, and those founded on simple contracts entered into by trading companies, and the principles upon which they may be supported were lately considered by the Court of Exchequer, in *The Mayor, &c. of Ludlow v. Charlton (b)*, and it was held by that Court, that a municipal corporation was not bound by a contract to pay money, although the consideration had been executed, such contract not being made under their common seal. That case appears to us to be a direct authority in favour of the present defendants; for the appointment of an attorney to conduct important suits affecting the rights and property of the corporation, cannot

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(a) 6 Ad. & El. 846.

(b) 6 M. & W. 815.

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be considered a trifling matter, nor is it one of such frequent occurrence, or of such immediate urgency, as to render it inconvenient to postpone it, until the seal of the corporation can be affixed to the retainer. Still less can it be said, that the retainer of an attorney falls within the principle of the decisions relating to contracts made by corporations established for trading purposes. But another class of cases was cited at the Bar, in which corporations aggregate have been allowed to maintain actions on simple contracts not falling within either of the principles considered in *The Mayor of Ludlow v. Charlton*; such as *The Barber Surgeons' of London v. Pelson* (a), which was an action of assumpsit for money forfeited for a bye-law, and the *Dean and Chapter of Rochester v. Pierce* (b), which was assumpsit for use and occupation, and it was contended that all contracts to be binding, must be mutual, and that, therefore, where corporations may sue upon simple contracts, it follows as a legal consequence, they may also be sued. But we think the proposition, as to the necessary mutuality of contracts, was stated too broadly, and that it must be confined to those cases where the want of mutuality would leave one party without a valid and available consideration for his promise. The cases last cited do not, therefore, shew that corporations may be sued on parol contracts. It was further argued for the plaintiff, that if

the case of the city of London every year, who make an attorney by warrant of attorney in this Court, without either sealing or signing, and the reason is, because they are estopped by the record to say it is not their act." It appears to us, therefore, that none of the cases or arguments brought before us, are sufficient to establish a right of action in the plaintiff to recover the amount of the bills which the arbitrator disallowed, and that the law, as laid down by the Court of Exchequer in *The Mayor of Ludlow v. Charlton*, must govern this case. With respect to the appropriation of a portion of the money received by the plaintiff to the discharge of the Bills 2 and 3, it appears to us, that although the plaintiff could not have maintained an action to recover the amount of those bills, yet as the money was paid generally on account of all the bills after these two bills were delivered, the appropriation of the money made by him at the time cannot now be questioned. The claim of the plaintiff on these two bills was a just and equitable claim, although, from the absence of a contract under seal, it could not be made the subject of an action in a Court of law. The case, therefore, is not like that of *Wright v. Laing (a)*, where there were two contracts, one lawful, the other forbidden by law, and where no specific appropriation had been made at the time of payment. The result is, that the verdict must be entered according to the direction of the arbitrator.

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Judgment accordingly.

(a) 3 B. & C. 165.



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The declaration alleged, that inconsideration, &c., the defendants had undertaken and promised the plaintiffs to deliver certain goods of the plaintiffs, at the port of Canton, all and every dangers and accidents of the seas and navigation of whatever nature or kind soever excepted, unto certain persons, to wit, Messrs. E. and Co ; that the defendants had and received the said goods on board their ship, but disregarding their promise, did not, nor would

THE declaration stated, for that whereas the defendants heretofore, to wit, on the 12th of March, 1839, in consideration that the plaintiffs, at the special instance and request of the defendants, then shipped in good order and condition, in and upon the good ship or vessel called the *Manilla*, then lying in the port of Liverpool, and bound for Canton, certain goods of them, the plaintiffs, that is to say, twenty bales of merchandise, and twenty-five cases of merchandise, of great value, to wit, of the value of 700*l.*, to be carried and conveyed by the defendants therein from Liverpool aforesaid to Canton aforesaid, for certain freight and reward to them, the defendants, in that behalf, the defendants undertook, and then promised the plaintiffs to deliver and cause to be delivered the said goods, in like good order and condition, at the aforesaid port of Canton, all and every dangers and accidents of the seas and navigation, of whatever nature or kind soever, excepted, unto certain persons, to wit, Messrs. Eglinton, Mc Lean & Co., deliver, or cause to be delivered, the said goods at the port of Canton, &c., although not prevented, &c., but on the contrary, &c. Plea, that after, &c., the ship of the defendants proceeded on its voyage to Canton, and within a reasonable time, the said ship, with the plaintiffs' goods on board, arrived near to the said port of Canton, to wit, on the high seas, there adjacent, and that afterwards, certain persons, then being officers of our Lady the Queen, duly authorized in that behalf and then acting in the name of her Majesty's government there, to wit, one

or their assigns. And the plaintiffs in fact say, that the defendants, to wit, on the day and year aforesaid, had and received the said goods on board the said ship, for the purpose aforesaid. Nevertheless, the defendants, not regarding their said promise, did not, nor would deliver or cause to be delivered, the said goods, at the port of Canton aforesaid, to the said Messrs. Eglinton, Mc Lean & Co., or to their assigns, or otherwise howsoever, although not prevented therefrom by any danger or accident of the seas or navigation whatever, but on the contrary thereof, wrongfully and unlawfully omitted and refused so to do; and the plaintiffs further say, that they, the plaintiffs, by their agents, duly authorized in that behalf, to wit, on the 20th day of October, in the year aforesaid, sold and caused to be sold the said goods, at and for certain large and profitable prices, to wit, to the amount of 3000*L*., and that, by reason of the non-delivery thereof by the defendants, they, the plaintiffs, were wholly unable to deliver the same to the said purchasers, and all the benefit and advantage of the said sale, and the interest and profit of the price thereof, became and were wholly lost to them, the plaintiffs; and the plaintiffs further say, that afterwards, to wit, on the 1st of March, 1840, the defendants unloaded the said goods out of the said ship, at a certain place far distant from Canton aforesaid, to wit, at a place called Manilla, and they, the plaintiffs, were forced and obliged to pay and expend, and became liable to pay and expend, divers sums of money, amounting to a large sum of money, to wit, the sum of 1000*L*., in and about the defraying the expenses incurred in respect of the said goods at Manilla aforesaid, and causing the same to be conveyed from thence to Canton aforesaid. And the plaintiffs further say, that afterwards, to wit, on the 1st of April, in the year last aforesaid, they, the plaintiffs, were forced and obliged to sell the said goods at a very reduced price from the price for which the same were so previously sold as aforesaid, to wit, at 1000*L* lower price, &c.

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Pleas, eighthly, that after the making of the said promises in the declaration mentioned, and before any breach thereof, to wit, on the 6th of April, 1839, being a reasonable time in that behalf, the defendants caused the said ship in the declaration mentioned, having the said goods of the plaintiffs so on board thereof, to sail and proceed, and the said ship then sailed and proceeded on its voyage from Liverpool, aforesaid, to Canton, in the dominions of the Emperor of China, being the port of Canton aforesaid, and in a reasonable time in that behalf, to wit, on the 29th of October, 1839, the said ship, with the said goods so on board thereof, as aforesaid, arrived near to the said port of Canton, to wit, on the high seas there adjacent. And the defendants further say, that after the said ship had so proceeded and arrived as aforesaid, to wit, &c., certain persons then there, being officers of our lady the Queen, duly authorized in that behalf, and then exercising the powers of her Majesty's government there, to wit, one Charles Elliot, then being chief superintendent of the trade of her Majesty's subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one ——— Smith, then being captain of her said Majesty's ship the Volage, and then being the commanding officer of her said Majesty's naval forces there, did, for divers good and sufficient and lawful

their commands, and by the force and duress thereof, forcibly constrain and compel the said ship, and from thence continually have constrained and compelled the same not to proceed to Canton aforesaid, and thereby prevented, and thenceforth always hitherto have prevented, and still do prevent, the said defendants from delivering the said goods and merchandises at Canton aforesaid; and the defendants say, that because of the said force and prevention of the said officers as aforesaid, and because of her said Majesty's forces, and the restraint and duress and prevention thereof, the defendants could not at any time from the making of their said promise, hitherto deliver or cause to be delivered the said goods at the port of Canton aforesaid, wherefore they did not deliver the same at Canton aforesaid, as in the said declaration mentioned. Verification.

Ninthly, a like plea, which alleged further, that before the defendants or their agents had received any notice of the premises, and before the said officers and forces had in any-ways prevented, hindered or restrained the said ship from proceeding to Canton as aforesaid, the said ship had proceeded on its voyage to Canton aforesaid, to parts far distant from Liverpool aforesaid, to wit, to the high seas near to Canton aforesaid, to wit, on, &c.; and the defendants further say, that a certain place, called Hong Kong, was then a place of safety for the said ship, and a place to which the said officers and forces did not prevent or hinder or restrain the said ship from proceeding, and a place near to Canton aforesaid, and a place from which the said ship and the said goods on board thereof might speedily have been conveyed to Canton aforesaid, if the said officers and forces aforesaid had at any time ceased to prevent and hinder and restrain the said ship from proceeding to Canton aforesaid. And because of the premises in this plea mentioned, and because it was then a reasonable and discreet measure for the interests of the plaintiffs as owners of the said goods, and for the interests of those concerned in

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the said adventure, for the said ship and cargo thereof to proceed to Hong Kong aforesaid, and because, to have proceeded to any other place than Hong Kong aforesaid, would have been an unreasonable and indiscreet measure in that behalf, and very injurious to the plaintiffs as such owners of the said goods as aforesaid, the defendants, by their servant or agent in that behalf, to wit, by one William Pearson, then being the master of the said ship, and the servant and agent of the defendants, duly authorized in that behalf, caused the said ship, with all reasonable dispatch, after the said ship was so prevented and hindered as in the plea mentioned, to proceed to Hong Kong, being the only safe and proper place in that behalf, to wit, on the 29th of October, 1839; and the defendants further say, that the said W. Pearson did, whilst the said ship was at Hong Kong aforesaid, and in a reasonable time after the arrival of the ship there, to wit, &c., give to the said Messrs. Eglinton, McLean & Co., the said persons in the said declaration mentioned, notice of the said several premises, and did then offer the said Messrs. Eglinton, McLean & Co., to deliver the said goods to them there, and did, to wit, then, request them to accept and receive the said goods from him, and to give him, the said W. Pearson, orders what to do with the said goods, and that the said Messrs. Eglinton, McLean & Co. then refused to receive

and the defendants say, that after the said ship left Hong Kong aforesaid, as last aforesaid, the said W. Pearson, in a reasonable time in that behalf, to wit, &c., gave notice to the said Messrs. Eglinton, McLean & Co., of the premises, and then requested them to receive the said goods, and to give orders concerning the said goods, and the said Messrs. Eglinton, McLean & Co., then wholly refused so to do; and because the neighbourhood of Canton aforesaid, and of Hong Kong aforesaid, was, to wit, then, and from thence hitherto hath been, and still is, dangerous for the said ship to remain in, on account of the perils of the seas and navigation, and of the enemies of our lady the Queen, then there being, and because it was, to wit, then, expedient for the interests of the plaintiffs that the said goods of the plaintiffs should be deposited in some place of safety, and because the place in the declaration mentioned, called Manilla, was a safe and convenient place of deposit, and the only safe and convenient place of deposit within a reasonable distance from the said place where the said ship then was, and from Canton aforesaid, therefore the said W. Pearson, to wit, then caused the said ship to sail, and the said ship then sailed to Manilla aforesaid, for the purpose of there depositing the said goods, as in this plea mentioned; and the said goods of the plaintiff were, to wit, on the 5th of April, 1840, unloaded from and out of the said ship at Manilla aforesaid, and delivered at Manilla aforesaid, to certain persons there, to wit, to certain persons trading there under the firm of Kerr, Murray & Co., then being the agents and correspondents of the plaintiffs at Manilla aforesaid, duly authorized in that behalf, and being proper and reasonable persons in that behalf with whom to leave and deposit, and to whom to trust the said goods, which is the same unloading in the declaration complained of, of all which premises in this plea mentioned the plaintiffs, in a reasonable time in that behalf, to wit, on the 1st of July, 1840, had notice. And the defendants further say, that the acts of the defendants, and of the said W.

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Pearson, &c., in respect of the said goods, from the time of the making of the said promises hitherto were, and each of them was reasonable, and proper, and discreet acts, and a reasonable, proper, and discreet act in that behalf, and were and each of them was truly, and honestly, and discreetly done by the defendants and the said W. Pearson, &c., with a reasonable, and discreet, and honest view to the interest of the plaintiffs as such owners, and were and each of them was such acts and act as an honest and discreet person would, in the exercise of a sound discretion in that behalf have done under the circumstances aforesaid, and such as it, to wit, then became and was the duty of the defendants, and of the said W. Pearson, &c. to do. Verification :

Demurrer to the eighth plea: for that the authority of the said officers, that is to say, Charles Elliot and Smith, to interrupt and prohibit, and prevent and discharge the said ship from proceeding to Canton, is not shewn or stated in the said eighth plea as it ought to have been if any such authority existed; and also for that no such authority was conferred upon them by common or statute law, and that if they had any such authority, its nature, and how conferred upon them, ought to have been stated and shewn in the said plea; and also, for that it is not shewn how or by what authority the said officers exercised the power of

contract complained of in the said declaration: and also for that the said eighth plea is in other respects uncertain, &c.

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To the ninth plea, the plaintiffs also demurred for the same causes assigned above, as affording objections to the eighth plea, and also for that so much of the matter contained in the ninth plea as is in addition to the matter stated in the eighth plea, is pleaded to damage only, and is untechnical and improper, and inartificially pleaded, and renders the said last plea of great and wholly unnecessary and improper length; and also for that it consists of matter upon which the plaintiffs cannot take or offer any certain issue. Joinder in demurrer.

Bompas, Serjt., in support of the demurrer. The defendants had failed to shew any legal authority to justify the non delivery of the goods committed to their care by the plaintiffs; the contract, as it was alleged, was a precise and definite contract for the delivery of the goods at Canton, and the exception to it was limited to failure by reason of "all and every the dangers and accidents of the seas and navigation, of whatever nature or kind soever;" and if by any other cause the defendants were prevented from delivering the goods, such delivery not being illegal, the consequences of such breach of their contract fell upon them. This was to be collected from the case of *Paradine v. Jane* (a), where it was laid down, that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by the contract. There was nothing alleged in the defendant's pleas in this case, which shewed that it would have been unlawful for him to have completed his contract. If the authority of Captain Elliot and of Captain Smith were shewn to be sufficient,

(a) Aleyne's Rep. 27. Vide also *Startup v. Cortassi*, 2 C., M. & R. 166.

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the answer might perhaps be good, but there was no sufficient allegation of such authority. The pleas stated that they were "exercising the powers of her Majesty's government," and that Captain Elliot was "chief superintendant of the trade of her Majesty's subjects to and from the dominions of the Emperor of China." The first of these allegations was insensible, because it was impossible to ascertain with certainty what was the meaning of the term used. The second was founded upon the provisions of the statute 3 & 4 Wm. 4, c. 93, which was an act to regulate the trade to China and India; but there were no allegations in the pleas which shewed that the requisites of that statute had been complied with. Neither did the plea allege that any of those circumstances had arisen, of war, or of a blockade or embargo, or of a prohibition to export, which had been held either to suspend or to dissolve a contract. The cases of *Barker v. Hodgson* (a), *Hadley v. Clarke* (b), *Gosling v. Higgins* (c), *Blight v. Page* (d), *Touteng v. Hubbard* (e), and *Hill v. Idle* (f), were referred to.

Channell, Serjt., for the defendants. The authority of the case of *Paradine v. Jane*, was not sought to be impugned, but it was contended, that from the circumstances disclosed upon the face of the pleas, an implied necessity to abstain

any force upon the defendants, it must be contended that his authority was sufficiently shewn in the pleas. In such a case as the present, it was submitted that the Court could not look for a particular statement of the manner in which Captain Elliot obtained his authority; that was a subject upon which the defendants could not obtain information or proof of that precise nature which was required in ordinary cases, and the Court would sanction such generality of pleading as was here adopted, where it was impossible to state the facts relied upon with certainty, or without great prolixity. Here it was alleged that Captain Elliot and Captain Smith were officers "of our lady the Queen, duly authorized in that behalf, and then exercising the powers of her Majesty's government;" and this allegation, coupled with those which followed that Captain Elliot was chief superintendent of trade according to the form of the statute, and that Captain Smith was Captain of her Majesty's ship the *Volage*; and having command of her Majesty's naval forces, it was submitted afforded a sufficient explanation of their position, and raised a sufficient presumption that the powers requisite to authorize them to publish and enforce the prohibition which was alleged against the defendant's ship going to Canton, were reposed in them. It would be extremely inconvenient, it was urged, that the defendants should be called upon to state the manner in which Captain Elliot derived his authority from the government, because much of the communication between the government and its officers must be necessarily of a secret nature. Then was the act of her Majesty's officers sufficient to suspend the execution of the contract? If Captain Elliot was duly authorized, his orders must be obeyed; and the case was therefore like *Hadley v. Clarke and Others*. There the plaintiff brought an action against the defendants, as owners of the ship *Pomona*, for not carrying to Leghorn goods put on board the *Pomona*, at Liverpool, to be conveyed to Leghorn, the dangers of the seas only excepted. The ship sailed from Liverpool, and in pursuance of permission

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given for that purpose, put into Falmouth on the 30th of June, 1796, to wait for convoy. While she waited there for that purpose, an embargo was, by order of the King in council, dated 27th of July, 1796, laid on all ships bound to Leghorn, being one of the ports in the territories of the Grand Duke of Tuscany, then in the possession of the French. The embargo was directed to continue until further orders of the Privy Council. On the 23rd of August following, another order of council issued, allowing vessels in the situation of the Pomona to return to their ports of lading, and land and warehouse their cargoes there under certain regulations. In the month of August, 1798, and not before, the Pomona left Falmouth without the consent of the plaintiff, and returned to Liverpool, where the plaintiff received the goods without prejudice to the question, whether, under the circumstances, the defendants were excused from the performance of the contract. On the 24th of October, 1798, the embargo was taken off. The plaintiff having recovered a verdict at the trial, his right to recover was afterwards discussed before the Court of Queen's Bench, and the Court was of opinion that the embargo did not dissolve the contract, but was a temporary restraint only, and operated only as a suspension of the contract. *Barker v. Hodgson* was to the like effect, and the same principle was to be derived from *Atkinson v.*

appeared on the pleas it was still in full force and operation. The Court could not admit a general statement of the authority of Captain Elliot to be sufficient, but a precise allegation of a sufficient and lawful authority delegated to him must be shewn. There was nothing in the pleas to shew that either a blockade or an embargo had been declared, nor were the acts of Captain Elliot stated to be in furtherance of the objects or necessities of any war with China. There was no lawful excuse stated, therefore, for the breach of the contract declared upon, and the plaintiffs were entitled to judgment on this demurrer.

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TINDAL, C. J.—I am of opinion that the pleas pleaded in this case are bad in law. The only ground on which those pleas could be an answer to the action is, that the contract for the carriage of these goods had been dissolved by some superior authority, and on looking at the pleas, the cause alleged for the dissolution of the contract—and it must amount to that or it is no answer at all—is, that after the vessel, in which the goods had been shipped, had proceeded to, and had arrived near, the port of Canton, certain persons, then being officers of our lady the Queen, duly authorized in that behalf, and then exercising the powers of her Majesty's government there, namely, one Charles Elliot, chief superintendent of trade, and one Smith, the captain of her Majesty's ship, the Volage, did prevent the said goods from being landed at the said port of Canton. Then does this allegation disclose a sufficient authority on the part of these persons to prevent the landing, so as to dissolve the contract? It is not said that this was done in the exercise of any acknowledged prerogative of the Crown, to whom it belongs to declare a state of war with the subjects of another government; and even, perhaps, if it had been alleged that war had been declared between this country and the Emperor of China, this case would scarcely be held to be within the authority of those decisions where such a declaration had been held to dis-

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solve the contract, because those were cases in which the goods were to be delivered to the enemy, whereas here, they were to be delivered to certain persons at the port of discharge, who were the agents of the shipper; and a question might arise whether those cases apply here, or whether a difficulty might not present itself on this part of the case,—but it is clear that the pleas amount to, and intend to set up a dissolution of the contract by the act of prevention of this officer, who, by the plea, is called the superintendent. Now, let us see whether, under the authority of the act of Parliament, he could exercise any such power as is stated. The act is the 3 & 4 Wm. 4, c. 93, and the fifth section is the first which speaks of the authority of the superintendent. That section recites, “And whereas it is expedient for the objects of trade and amicable intercourse with the dominions of the Emperor of China, that provision be made for the establishment of a British authority in the said dominions; be it therefore enacted, That it shall and may be lawful for his Majesty, by any commission or commissions, or warrant or warrants under his royal sign manual, to appoint, not exceeding three of his Majesty’s subjects, to be superintendents of the trade of his Majesty’s subjects to and from the said dominions, for the purpose of protecting and promoting such trade, and by any such commission or warrant as

commissions, as to his Majesty in council shall appear expedient and salutary, to give to the said superintendent, or any of them, powers and authorities over and in respect of the trade and commerce of his Majesty's subjects within any part of the said dominions; and to make and issue directions and regulations touching the said trade and commerce, and for the government of his Majesty's subjects within the said dominions; and to impose penalties, forfeitures, or imprisonments for the breach of any such directions or regulations, to be enforced in such manner as in the said order or orders shall be specified." The orders of the privy council are meant by this section, but the plea does not state that any such orders were given. There is no doubt whatever that under the particular circumstances of the case, Captain Elliot may have exercised a sound and just discretion in preventing these goods from being landed at Canton, in the unsettled state in which China then was, and if we can look to our general knowledge upon the subject, we know that at the time when this occurred, people thought their goods, which were in China, to be in great jeopardy; but that does not form a legal answer to this declaration,—it does not shew that the contract entered into for carrying these goods and delivering them to the agents of the plaintiff was, by any justifiable cause, dissolved before the time fixed for its execution. The judgment must, therefore, be for the plaintiff.

COLTMAN, J.—I am of the same opinion. The case lies in a narrow compass, and it has been very properly admitted that unless the contract was dissolved by reason of there being some illegality in carrying in these goods to the port of Canton, by reason of its being so declared by some duly constituted authority, there is no defence to this action set up on the pleadings. That authority, in order to be a justification to the defendant, must be shewn on the face of the pleadings, and there must be a sub-

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stantial statement which will establish that authority, although, perhaps, it may be alleged in somewhat more general terms than are ordinarily required; but that is a point on which I give no opinion. Here, however, there is not such a statement of an authority as is sufficient. The mere fact of Charles Elliot being a superintendent of trade, without any order from the privy council, under section 6 of the 3 & 4 Wm. 4, c. 93, authorizing the making of orders and regulations, does not import that he was authorized to regulate the trade of the country, and the case rests in the position of his having no other power than that conferred by section five. That being the case, the defence set up is insufficient.

ERSKINE, J.—It has been very properly admitted by my brother *Bompas*, that if it appeared on the face of these pleas that the delivery of these goods was prevented by some person duly authorized by the law of this country, there would be a good answer to the action. But he has insisted that there is no sufficient allegation that these persons who prevented their delivery, had any legal authority so to do; and I think no such authority appears on the plea.

MAULE, J.—It has not been argued that there is any

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DOWLING, Serjt., moved for a rule, calling on the lessor of the plaintiff in this action, to shew cause why all further proceedings in the suit should not be stayed, until the determination of a rule for a nonsuit, now pending in the Court of Queen's Bench in a similar action between the same parties. From the affidavits in support of the motion, it appeared that the defendant was the lessee of a house at an annual rent of 210*l.*, which he held under a beneficial lease granted by Mr. Henry, the lessor of the plaintiff, determinable on a forfeiture by non-payment of the rent. On the 9th of April in the present year, an action of ejectment was commenced in the Court of Queen's Bench, by which it was sought to eject the defendant, in respect of an alleged forfeiture. That action was tried at the sittings at nisi prius after Easter Term last, when an objection was raised on behalf of the defendant, that the demand of rent which had been proved was not in accordance with the covenants of the lease; the jury, under the direction of Lord *Denman*, who tried the cause, found a verdict for the plaintiff, but the defendant obtained leave to move to enter a nonsuit. In Trinity Term, a rule nisi was obtained accordingly, which now stood for argument; but notwithstanding these circumstances, the plaintiff had commenced a fresh action in this Court, founded upon an alleged forfeiture, subsequent in date to that which formed the ground of the action in the Court of Queen's Bench, but which arose upon the same covenant in the lease. It was urged, therefore, that this was an improper attempt on the part of the lessor of the plaintiff to snap a judgment in this Court, where he knew that his proceedings might be more rapidly carried on, and his object more speedily gained than in the Queen's Bench, considering the state of the business of that Court, but that such an attempt to

The Court refused to stay the proceedings in an action of ejectment, brought, in respect of a forfeiture, upon the ground that another action of ejectment was pending in the Queen's Bench, between the same parties, to recover the same premises, upon a forfeiture, which it appeared, was antecedent to, and entirely distinct from that which formed the subject of the suit in this Court.

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get rid of the rights of the defendant would not be sanctioned. [*Tindal*, C. J.—This action is in respect of a forfeiture by reason of the non-payment of rent accruing due subsequently to the forfeiture, on which the action in the Court of Queen's Bench is founded. Every quarter a fresh liability accrues, and each is independent of the rest]. The Court would hardly allow two actions to be going on at the same time, both having the same object in respect of the same premises. [*Coltman*, J.—The action in the Queen's Bench will not decide this in any way]. But, nevertheless, there was a hardship on the defendant in his being compelled to defend two actions, which were identical in their nature, simultaneously: and the Court would not favour an attempt like this, the object of which was to get rid of the beneficial occupation of the defendant. He cited *Chitt. Arch.* p. 991 (*a*), where it was said that proceedings in a second ejectment would be stayed until a special verdict in a former ejectment is determined.

TINDAL, C. J.—Upon principle, the proceedings in such a case as this can only be stayed where the same point of law is raised, or the same title is called in question in both actions. Here that is not the case in truth, for although the ejectment concerns the same lease, and the same premises, and the same parties, it refers to a different forfeiture,

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CHANNELL, Serjt., moved for a rule, calling on the plaintiff, in this action, to shew cause why the verdict entered for him on the fourth issue, should not be set aside, and entered for the defendant, or why the damages on that issue should not be reduced to 1*s.*, or why there should not be a new trial. It was an action of debt, and the declaration contained counts for work and labour done, for money paid, and on an account stated. The defendant pleaded, first, never indebted; secondly, except as to 7*l.* 16*s.* 8*d.*, payment; thirdly, except as to 7*l.* 16*s.* 8*d.*, set-off; fourthly, as to 7*l.* 16*s.* 8*d.*, tender, and payment of that sum into Court: Replication, as to the first three pleas, issue, as the fourth plea, a denial of the tender, on which issue was joined. The action was tried before the Secondary of London, when it appeared, that the plaintiff claimed in all, a sum of 42*l.* 14*s.* 9*d.*, for work, &c., performed by him as a surveyor; the defendant, by his witnesses, shewed that 31*l.* 11*s.* 9*d.*, was a reasonable sum for the plaintiff to demand; and the plaintiff himself was willing to treat the case as if 35*l.* was the full sum to which he was entitled; and the jury eventually acted on this view of the case. The questions which became material, arose on the pleas of tender and set-off. The defendant was a baker, and had supplied bread to the plaintiff to the extent of 27*l.* 3*s.* 4*d.*: his journeyman was called to prove the tender, and he stated that he had, at first, offered the plaintiff 5*l.* 17*s.* 8*d.*, as the residue which was due to him, but that on this sum being rejected, he increased his tender by 2*l.*, saying, "I offer you 7*l.* 16*s.* 8*d.* as the balance of 35*l.*, and request a receipt in full;" the witness added, at the trial, "I would not have parted with the money, without the receipt." There was evidence in reply, which went to contradict the testimony of this witness as to the amount of the tender, but the jury, under the direction of the se-

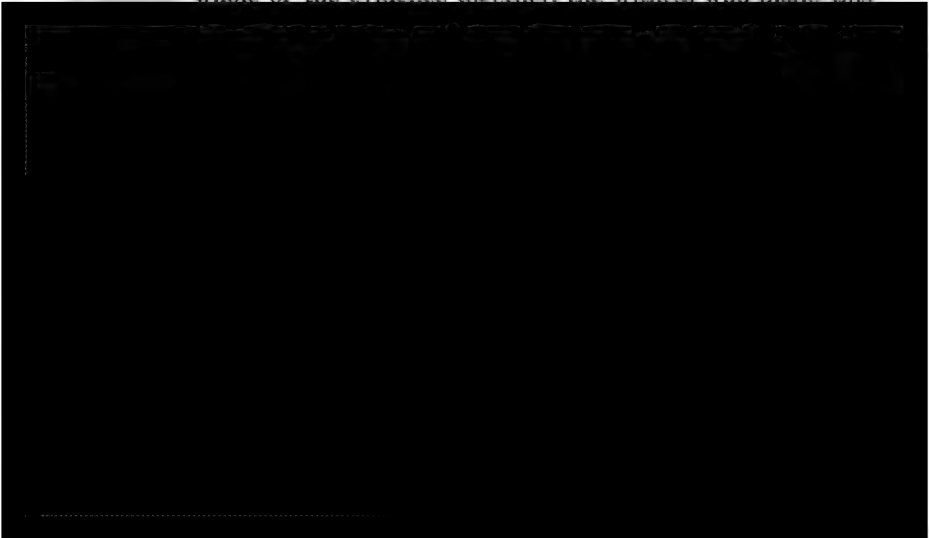
In debt, the plaintiff claimed 42*l.*; the defendant sought to shew that 31*l.*, was all that was due, and the plaintiff was willing to accept 35*l.*, (at which sum the jury eventually assessed the damages.) In support of pleas of set-off and tender, the defendant shewed payments, to the extent of 29*l.*, and called a witness to prove a tender; he stated that he had gone to the defendant, and had said, "I offer you 7*l.* 16*s.* 8*d.* as the balance of 35*l.*; and request a receipt in full:" *Held*, a conditional, and therefore, an insufficient tender.

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condary, found that it was not a legal and sufficient tender. A verdict was entered for the plaintiff, on the first, second, and fourth issues; but for the defendant on the third, (the set-off.) The point intended to be raised by this motion, was the sufficiency of the tender proved. It was not sought to impugn the authority of those cases, which decided, that in order to support a plea of tender, there must be evidence of an unqualified offer; but it was contended, that this case fell within the authority of *Cole v. Blake* (a), and those subsequent decisions in *Richardson v. Jackson* (b), and *Robinson v. Ferreday* (c), by which it was confirmed. The effect of the decision in *Cole v. Blake*, was, that although a party tendering money, cannot, in general, demand a receipt for it, yet that where the creditor does not object to the demand of the receipt, but that the sum is insufficient, the tender is good. *Richardson v. Jackson* was to the same effect, and it seemed to have been even doubted there, whether the demand of a receipt would, under any circumstances have invalidated the tender. But, at all events, supposing the Court should be of opinion, that the plea of tender was not supported, the plaintiff was only entitled to nominal damages on the issue on that plea.

TINDAL, C. J.—I am of opinion, that looking at the whole of the evidence together, the witness who made this



position, that a tender so made, is a valid tender. On the other point, it seems just, that the damages should be reduced to 1*s.*, as it is prayed; and a rule nisi may go.

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The rest of the Court concurred.

Rule accordingly.

MERCER v. CHEESE and Others.

ASSUMPSIT. The plaintiff, by his declaration dated 4th of February, 1842, (writ issued 7th of September, 1841), claimed 355*l.* 5*s.* 6*d.*, for work and labour done; for goods sold and delivered; and on an account stated. Pleas; secondly, by the defendants, John Kinder Cheese, Thomas Hedges, Thomas Dyer, Charles Wall, John Paul Whitelocke, James Hedges, and Thomas Reynolds, as to the sum of 150*l.*, parcel, &c., that the said alleged promises in the declaration mentioned, as to the said sum of 150*l.*, parcel, &c., were made by the defendants jointly with one Thomas Morris, to wit, on, &c., and the said John Kinder Cheese, &c., further say, that after the making of the said promises by the defendants, and the said Thomas Morris as aforesaid, and before the commencement of this suit, to wit, on the 24th of December, 1840, the plaintiff for, and on account of the said sum of 150*l.*, parcel, &c., and the said promises of the said defendants, and the said Thomas Morris, in respect thereof, made his certain bill of ex-

In assumpsit, for work and labour done, &c., the defendants pleaded that the promises in the declaration mentioned, were made by them jointly with one T. M., and that after the making of the same, and before the commencement of the suit, to wit, on, &c., the plaintiff, for and on account of 150*l.*, parcel, &c., and the said promises of the defendants, and T. M., in respect thereof, made his bill of exchange, and directed

the same to T. M., and thereby required him to pay to the plaintiff's order, three months after date, the said sum of 150*l.*, and the said T. M., and on account of the said sum of 150*l.*, parcel, &c., and the said promises of him, the said T. M., and the defendants, in respect thereof, then accepted the same bill, and delivered the same to the plaintiff, who took and received the same, for and on account of the said sum of 150*l.*, parcel, &c., and the said promises, &c. Demurrer, for that it did not appear, that the bill was not due before the commencement of the suit; or that the plaintiff had ever indorsed or transferred the same to any third person; or that the bill was not still unpaid in the hands of the plaintiff as holder; and for that the delivery of the bill by T. M., did not affect or take away the plaintiff's remedy against the defendants.

Held, that the demurrer was ill, for that the defendants could not know, nor could they prove the facts, whether the plaintiff had or had not transferred the bill; but the Court allowed the plaintiff to amend, by replying, on payment of costs.

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change in writing, bearing date, to wit, on the day and year last aforesaid, and directed the same to the said Thomas Morris, and thereby required the said Thomas Morris, three months after the date thereof, to pay to the plaintiff's order the sum of 150*l.*, and the said Thomas Morris, for and on account of the said sum of 150*l.*, parcel, &c., and the said promises of him, the said Thomas Morris, and the defendants in respect thereof, then accepted the said bill so drawn by the plaintiff as aforesaid, and delivered the same to the plaintiff, who then took and received the same of and from the said Thomas Morris, for and on account of the said sum of 150*l.*, parcel, &c., and the said promises, &c. Verification. Thirdly, a like plea as to a further sum of 150*l.*

Demurrer to the above pleas, for that it is not alleged in, nor does it appear from, either of the said pleas, that the bills of exchange therein mentioned were not, nor was either of them, due before, and at the time of the commencement of this suit, and that on the contrary thereof, it appears from the lapse of time since the making of the said bills, and the dates thereof respectively, that the same were, and each of them was, overdue at the time of the commencement of this suit; and for that it is not alleged in, nor does it appear from either of the said pleas that the plaintiff ever indorsed or transferred the said bills

suspend, alter, or take away the remedy of the plaintiff against the defendants in this action for the debt due from the defendants, there being no agreement of the plaintiff to such effect alleged either with the said Thomas Morris, or the defendants, or with either of them, nor any consideration for any such agreement, &c.

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Channell, Serjt., in support of the demurrer. The pleas were insufficient, on the grounds stated in the demurrer. The defendants should either have shewn that the bills had become due, and were paid, and so have shewn that the debt to the plaintiff was satisfied; or that the plaintiff had indorsed the bills to some third person, and that the liability of Morris to such person still continued, or had ceased; or should have adopted some other mode of shewing that the original liability of the defendants to the plaintiff had been actually discharged. Without some such allegations, however, the plea was defective. *Kearslake v. Morgan* (a), would probably be cited on behalf of the defendants. There, to an action of assumpsit, for goods sold and delivered, and money lent, the defendant pleaded the general issue, and that, as to 4*l.* 14*s.* 6*d.*, one W. P. made his promissory note for 10*l.* payable to the defendant or order at a time which had elapsed before the commencement of the suit, and that the defendant, before the note became due, indorsed the same to the plaintiff, for and on account of the said sum of 4*l.* 14*s.* 6*d.*, and of the sum of 5*l.* 5*s.* 6*d.* paid by the plaintiff to the defendant, and that the plaintiff accepted and received the same note for and on account of those sums. To this plea, there was a general demurrer, and it was urged that the plea ought to have alleged that the note was received in satisfaction of the debt, but the Court, on argument, held that the plea was good, and advised the plaintiff to withdraw his demurrer, and reply, which he did. But there, the

(a) 5 T. R. 513. Vide also *Stedman v. Gooch*, 1 Esp. 3.

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maker of the note which was given to the plaintiff, was a stranger to the original cause of action, and the defendant gave not only his own indorsement on the note as a security to the plaintiff, but he gave also the security of the maker of the note. Here, there was no such collateral security, but the pleas amounted simply to this, that the defendants themselves had given the bills to the plaintiff. That case, however, had been before the Court of Exchequer in *Sard v. Rhodes* (a). That was an action of assumpsit by the indorsee against the acceptor of a bill of exchange for 43*l.*; plea, that after the bill became due, one G. P., the drawer of the bill, made his promissory note for 44*l.*, and delivered the same to the plaintiff in full satisfaction and discharge of the bill: Replication, that although the plaintiff accepted the note in full satisfaction and discharge of the bill, yet when the note became due, it was not paid, and that it still remained unpaid; and it was held that the replication was bad, because the plaintiff, having accepted the note in full satisfaction of the bill, could not now sue upon the latter, and also that the plea was good. *Parke*, B., in giving judgment, said, that the note being overdue and unpaid in the plaintiff's hands, he might sue upon it, but he continued, "It is averred to have been accepted in full satisfaction and discharge of the bill. The plaintiff, therefore, takes it for better for

suspension of the debt of these defendants (*a*), and that it was for them distinctly to get rid of their liability by some one of the modes already suggested. The same observations applied to the case of *Lewis v. Lyster* (*b*).

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Talfourd, Serjt., for the defendants. Although the plea might not shew an actual extinguishment of the original debt, yet it stated such facts as called upon the plaintiff to reply. That was the effect of the case of *Kearslake v. Morgan*, which was strongly in favour of the defendants. The plaintiff, it was to be observed, was in no difficulty; he could tell whether the bills were still unpaid, or whether they remained in his hands; but the defendants, if they put any such allegations on the record, would have the onus thrown on them of proving them, which might cast upon them a necessity which they could not meet.

Channell, in reply. *Kearslake v. Morgan* undoubtedly threw some difficulty in the way of the plaintiff. It was conceded that the pleas which were on the record did not shew an extinguishment of the debt, but only a suspension of the remedy of the plaintiff; and if that was so, it was urged that it was the duty of the defendants to shew that such suspension continued down to the time of the commencement of the suit. The defendants, however, had not shewn that such was the case; for they had not shewn that the bills were then still running. [*Maule*, J.—Whether the bills are due or not, Morris may at some time be made to pay them. The pleas shew, therefore, that the debt is put in such a position that it may be assigned].

TINDAL, C. J.—The difficulty which strikes me presents itself on the argument which was used in *Kearslake v. Morgan*, and which has been repeated by my brother

(*a*) *Simon v. Lloyd*, ante, vol. 3, vol. 4, p. 377, O. S. Vide also p. 813, O. S.; 2 C., M. & R. 187. *Crisp v. Griffiths*, ante, vol. 3, p. (b) 2 C., M. & R. 704; Ante, 752, O. S.; 2 C., M. & R. 159.

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Talfourd for the defendants. How can the defendants know that the plaintiff still has the bills, or that he has or has not indorsed them away? The ground of my opinion is, as my brother *Maule* has put it, that the plaintiff has consented to take such a security of Morris, as enables him to assign the security to third persons, and the defendants cannot tell whether he has assigned it or not. The plaintiff, however, can tell that, and I think he ought.

Channell then applied for leave to amend.

PER CURIAM.—Let the plaintiff have leave to withdraw the demurrer, and to amend by replying, on payment of costs.

Leave to amend, on payment of costs.

LEAKE v. LOVEDAY and Another.

To a count on
 trover, for
 goods seized
 by defendant,
 as sheriff, the
 defendant
 pleaded, not
 possessed; the
 plaintiff claim-

TALFOURD, Serjt., moved for a rule, calling upon the plaintiff to shew cause why the verdict found for him should not be set aside, and a verdict entered for the defendants. It was an action on the case brought by the plaintiff, an attorney at Witney, in Oxfordshire, against the defendants, who were the late sheriff of the

secondly, not possessed. The cause was tried before *Erskine, J.*, at the Summer Assizes 1842, for the city of Oxford, when the following facts were proved in evidence. Up to the year 1838, one R. F. Cox had been a partner in the banking house of Messrs. Morrell & Co., bankers at Oxford, and resided in the house in which the business of the firm was carried on; owing to some misunderstanding, in the month of January in that year, Cox relinquished his partnership, but he continued to occupy, by permission of Messrs. Morrell, the apartments which he had hitherto inhabited; a writ of *fi. fa.* was shortly afterwards executed on the furniture of Cox, and the plaintiff became the purchaser of the goods which were seized; a bill of sale was executed, transferring the property in the goods to the plaintiff, (and it was found by the jury that this transaction was *bonâ fide*); but by an arrangement made between the plaintiff and Cox, the latter continued in possession of the furniture, at a nominal weekly rent for the use of the same, and by the same arrangement Cox attorned tenant to the plaintiff of the apartments which he then occupied over the banking house of Messrs. Morrell, at a rent of 5*s.* per week, although there was no pretence for saying that either of them had any title to the premises. On the 5th of December in the same year, a fiat in bankruptcy was issued against Cox, and assignees were chosen; they sent one Hutton, a messenger of the Court of Bankruptcy, to make inquiries with regard to the property of Cox, but the bill of sale being produced, he was satisfied that it related to the furniture in question, and repudiated any title thereto. Cox continued in possession of the furniture down to July 1841, and at that period the plaintiff put in a distress for the amount of the alleged bygone weekly rent. Messrs. Morrell having become acquainted with this circumstance, commenced an action of ejectment against Cox, and judgment being obtained against the casual ejector, a writ of *habere facias possessionem* was executed by the sheriff, under which the goods in the apartments lately occupied

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by Cox were put out into the street. By direction of a stranger (a clerk to Messrs. Morrell) the furniture was conveyed to an adjoining empty house, in order to preserve it from the effects of the weather, and an intimation was conveyed to the plaintiff of these circumstances, and the key of the house was tendered to him, in order that he might assume the charge of his goods; he, however, rejected the tender. In this state of things a new writ of *fi. fa.* against the goods of Cox was placed in the hands of the defendant Loveday, for execution, and under this writ he proceeded to levy, and seized the goods ejected from Messrs. Morrell's house, and which still remained in the place to which they had been conveyed as already stated. On the 26th of July, 1841, the assignees under the fiat in bankruptcy against Cox, set up a claim to the goods, and upon their indemnity, the sheriff sold the furniture, and paid to them the proceeds of the sale. At the instance of the plaintiff the proceedings in bankruptcy were admitted by the defendants; the plaintiff also gave evidence of the indemnity given to the defendants by the assignees. It was contended, on behalf of the defendants, first, that under the plea of not possessed, they were entitled to set up the right of the assignees as against the plaintiff; and secondly, that if that were so, the goods in question were, at the time of Cox becoming bankrupt, in his order and

On a subsequent day in Term,

Channell, Serjt. (with whom was *W. J. Alexander*) shewed cause. It was not competent for the defendants, under the circumstances of this case, to set up the right of third parties against the plaintiffs under the plea of not possessed. The defendants here were the sheriff and his officer, and they had seized the goods as belonging to Cox, by virtue of a writ of *fi. fa.*, which was altogether independent of the assignees, and they were therefore estopped from setting up the subsequently obtained authority of such third persons. The fact of the assignees having given the defendants an indemnity was immaterial, and did not import into the case any thing which operated to connect them with the plaintiff. Nor could the defendants set up as an authority for their acts any right which accrued subsequently to them: here, the assignees, after they had assumed that character, had repudiated all title to the very goods which were now in dispute, and whatever might have been the circumstances under which those goods had been allowed to remain in the possession of the bankrupt, that repudiation operated to their prejudice, and any title which they now sought to set up was only subsequently obtained. Their claim dated only from the 26th of July, 1841, and from that day only could they assert that they possessed any title. The defendants, however, must rely upon a title to the goods from the date of the bankruptcy; but such a title, it was urged, could not here be sustained. Further, the defendants could not here set up the *jus tertii*. If such a right could be urged by them in their justification, it threw upon the plaintiff the difficulties of opposing not only the persons whom he sued, but also the assignees, and possibly the execution creditor, of whose rights he might be totally ignorant. In *Carne v. Brice and Another (a)*, an issue was drawn up under the Interpleader Act, to try

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(a) 7 M. & W. 183; S. C., *Ante*, vol. 8, p. 884, O. S.

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whether certain wearing apparel taken in execution under a writ of *fi. fa.* issued by the plaintiff against the effects of one Richard Morgan, was the property of R. Morgan or not; and the declaration averred that the said goods and chattels, at the time of the seizure thereof, were the property of R. Morgan; and that averment was traversed by the plea, and issue was joined thereon; it appeared that the defendants in that case claimed as the trustees of the wife of Morgan, on the ground that the goods seized had been purchased with money vested in them for her sole and separate use, under her marriage settlement: and it was sought to be shewn that even supposing they, as such trustees, were not entitled, the property was vested in the assignees of Morgan, who had become bankrupt; the evidence was, however, rejected, and the Court of Exchequer, upon argument, decided that the learned Judge who tried the cause was correct in his views. That case was, therefore, similar to this, and shewed that here the right of the assignees could not be set up. In the case of *Fyson v. Chambers (a)*, trover was brought by the plaintiff as administratrix of John Croft, and the defendant pleaded not guilty and not possessed: it was held that the defendant could not set up under the latter plea that the intestate had been first insolvent and then bankrupt, and had not paid 15s. in the pound under the fiat, and that, therefore,

for that the right of the assignees did not accrue, if the argument already urged was correct, until long subsequently. The cases of *Owen v. Knight* (a), and of *Butler v. Hobson* (b), were distinguishable from the present.

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Talfourd, Serjt., (with whom was *Keating*), in support of the rule. The goods in question were in the order and disposition of the bankrupt at the time of his bankruptcy within the meaning of the act, and were, therefore, at that time, vested in the assignees, and the assignees had done nothing in acknowledging the acts of Hutton, the messenger, to preclude them from subsequently setting up their claim, or which prevented their title from dating from the period of the bankruptcy, although it was not asserted until subsequently. If their right accrued from the date of the bankruptcy, it was competent to the defendants to set up the existence of that right at the time of the conversion. The plea of not possessed in an action of trover put in issue, the plaintiff's title at the time of the conversion, and under that plea, therefore, the defendants were entitled to deny the plaintiff's property in the goods, either as against them, or as against the assignees. *Carne v. Brice*, had no bearing upon this case. That was an issue under the Interpleader Act, which was framed to inform the conscience of the Court, and in that particular case, the only question which was raised was, the title of the defendants as trustees, and the Court properly decided that the right of any third parties had nothing to do with the issue. In the present case, the assignees were the real defendants in the suit; the plaintiff was aware of that fact, for he treated them as such, and he was not justified, therefore, in setting up any allegation of surprise, or of hardship in being called upon to contest a title at the trial, of the nature of which he had previous intimation. *Butler v. Hobson*, was strongly in favour of the defendants. In

(a) 4 Bing. N. C. 54; S. C. 5 (b) *Ib.* p. 290; S. C. *Ante*, vol. Scott, 307; *Ante*, vol. 6, p. 244, 6, p. 409, O. S.; 5 Scott, 798. O. S.

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Chase v. Goble (a), the sheriff seized under a *fi. fa.*, at the suit of G., certain goods in the possession of one W.; the goods were claimed by C. and H. respectively, under three several mortgages from W.; upon an issue directed under the Interpleader Act to try their right, C. and H. being plaintiffs, and G., the execution creditor, defendant, it was held, that it was competent to the defendant to set up the title of the assignees of W., who had become bankrupt. *Lingard v. Messiter* (b), and *Watson v. Peache* (c), shewed that the jury had rightly found that the goods in question were in the order and disposition of the bankrupt at the time of his bankruptcy. In the former case, which was an action by the assignees of a bankrupt, brought to recover property in the bankrupt's possession as reputed owner, the plaintiff proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession of them until he committed an act of bankruptcy; and it was held, that that was *prima facie* evidence that he continued in possession as owner, and that it lay on the defendant to prove that the bankrupt had ceased to be the reputed owner. In *Watson v. Peache*, a coal merchant, at the time of his bankruptcy, had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's Act; these barges he had hired of the defendant, it being

case should be entered for the defendants. At present, the verdict stands for the plaintiff with damages for the value of the goods seized, but it was agreed at the trial, and I think that that agreement was very properly and discreetly made, that if the Court, in its discretion, thought that the defendants were entitled to the verdict, it should be entered for them. The main question which was urged at the trial, and which has been argued to-day, is, whether in the present state of the pleadings, and upon the facts which were proved, the defendants have a right to set up the *jus tertii*; for if they have a right to set up the title of the assignees under the bankruptcy of Cox, there is no doubt that the property in the goods which form the subject of the action, would rest in the assignees from the time of the bankruptcy, when they were last in the order and disposition of the bankrupt, even though they did not declare their intention to take them until subsequently to that period. This is not the ordinary case of goods which are found in a ready furnished house, taken by a person who becomes bankrupt, where no false credit is given to him by them, and where no colour is held out to the world of the property in them being in the bankrupt; nor is this a case in which the disposition of the goods is, in fact, left in the bankrupt. But here, the goods were originally the property of the bankrupt; a bill of sale was executed, by which the property in them was transferred to the plaintiff, but no alteration was made in the place in which they were kept, and in the eye of the world, the bankrupt remained in the same position in which he stood before, and continued to have them in his continued apparent order and disposition. The case, therefore, falls within the authority of *Lingard v. Messiter*, and *Watson v. Peache*, and that class of cases; and, therefore, I have no hesitation in saying, that if this defence can be set up, that is, if the sheriff can avail himself of the right of the assignees, such right, under the circumstances of the case, vests in them. Then can this right be set up? The pleadings are these:

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it is an action of trover, and the defendants plead that the plaintiff is not possessed of the goods in the declaration mentioned, as of his own property; and those are the only parts of the record to which, for the purposes of this motion, it is necessary to refer. The question is, whether, under the plea of not possessed, the actual title of third parties can be set up? It appears to me, that the very form of the plea containing negative words only,—that the goods are not the goods of the plaintiff, it falls upon the plaintiff to establish the affirmative of the issue. Undoubtedly, under the old form of pleading before the New Rules were introduced, the declaration in trover containing two allegations; first, that the goods were the property of the plaintiff; and secondly, that they had been converted by the defendant, the plea of not guilty put in issue both those parts of the plaintiff's averments, and it was necessary for the plaintiff, in establishing his case, to prove both his property in the goods, and the conversion of them by the defendant. And many cases may be shewn, in which the defendant has set up the *jus tertii*, in order to shew that the plaintiff was not the true owner. *Blainfield v. March (a)*, was a case where the plaintiff declared in trover as administrator, and the defendant sought to shew that there was a lawful executor in whom the property in question in the case vested. *Holt, C. J.*, held, that where the

same facts are put in issue. I at first thought that the case of *Carne v. Brice*, made in favour of the plaintiff, but I am of opinion that the answer which has been given to it is decisive; that was an issue directed to try particular facts, and that was a matter entirely under the guidance of the Court, and they might well refuse to allow these questions of the rights of third persons to be raised in surprise of the parties. But the position of this case is not at all analogous, nor does the suggestion of surprise here arise: because here, it appears, on the admissions, that the plaintiff had required the fiat, and the further proceedings in bankruptcy to be admitted, and the plaintiff himself called witnesses to prove that an indemnity had been given to the sheriff by the assignees, in order to bring the declarations of the assignees in evidence. The plaintiff possibly may have thought that the matter in contest would be the validity of the bill of sale, and he may not have foreseen that the assignees would have had recourse to this title in point of law, which they subsequently set up. I think, however, that the assignees had a right to insist on that defence, whether the objection was taken before verdict or not, and I think that the jury were right in finding that the goods were in the apparent order and disposition of the bankrupt with the consent of the true owner. I am of opinion, therefore, that the verdict must be entered for the defendants.

COLTMAN, J.—I also am of opinion, that the issue on the plea of not possessed on this record should be found for the defendants. The meaning of the plea is, that the plaintiff has no property in the goods in question, which will entitle him to maintain an action against this defendant. Then, has he any property in the goods? The conversion which is alleged against the sheriff takes place, not from the time of the money being paid over to the assignees, but from the time of the seizure of the goods, and at that time, it is said, he was a wrong doer against the plaintiff, because then

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the assignees had not come forward to assert their right to the property. But the effect of their assertion of their right to the property, is to vest the property in them from the time of the bankruptcy, and upon that state of facts, the sheriff would not be a trespasser against this plaintiff, because he has not seized their goods, but those of the assignees. The rule, which it is contended is a general rule, that a party is estopped from setting up the right of a third person as I understand it is this, that under particular circumstances, a party may be estopped from setting up the right of third persons, but that that rule applies to cases where the party has put himself into a position to preclude him from averring the truth in fact. That however, is not so here, but I think that this case falls within the principle alluded to by my Lord, and that the sheriff was entitled to set up the right of the assignees, and having established that right, that he is entitled to a verdict.

ERSKINE, J.—At the trial of this cause, two points were insisted upon by the defendant, under the plea of not possessed: first, that the plaintiff never had any property in these goods, and that the bill of sale, under which he claimed to have become the owner of them before the bankruptcy, was a mere fraudulent and colourable transaction; that question was left to the jury, and they found

theirs, having been left in the order and disposition of the bankrupt, yet that that defence was not open to the sheriff. I had no doubt that the assignees might have set up this defence successfully, because these goods having been originally the goods of Cox, the bankrupt, their possession not being changed so far as the world knew, it was just one of those cases which the Legislature intended to refer to, when they passed that section of the Bankrupt Act, (6 Geo. 4, c. 16, s. 72,) with respect to goods in the apparent order and disposition of bankrupts; but it occurred to me, that this not being the case, of assignees coming forward as plaintiffs to claim the goods, or of assignees having seized the goods, and being on the record as defendants, and the defendants, in fact, not setting up any seizure under the authority of the assignees, they would not be entitled to set up the defence which they proposed. But I now think that I was mistaken in the view which I then took, and that the defendants ought to be allowed to have the verdict entered in their favour, because the plea does not put in issue the right of the sheriff to seize the goods, but the property of the goods in the plaintiff. At the time the goods were seized by the sheriff, they were in the actual possession of the plaintiff, and that being so, the sheriff, when he seized them under the *fi. fa.*, and sold them under that writ, had completed the conversion; but I now agree that as at that time, though they had been in the possession of Leek, they were really the goods of the assignees, and as the assignees have now asserted their title to them, and have required the sheriff to pay over the proceeds to them, giving him an indemnity in respect of his liability, the sheriff has a right to set up these facts as a defence, and referring back the authority of the assignees to the time of taking the goods, the plaintiff has not made out his right of possession of the goods, as was necessary under the plea. I think, therefore, that the defendants are entitled to a verdict.

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MAULE, J.—The right of the assignees to these goods, depends upon their having been in the order and disposition of the bankrupt, within the meaning of the Bankrupt Act; and the cases which have been referred to, are decisive to shew that goods in the particular situation in which these were, are such as that the assignees may, if they think fit, assert their title to them, and that title, when asserted, reverts back to the time of the bankruptcy. In the case of *Isaac v. Belcher, Parke, B.*, says, “The plea, that the plaintiff was not possessed in this form of action, puts in issue the right of the plaintiff to the possession of the goods as against the defendant, at the time of the conversion.” The meaning of that plea is not to set up the narrow right of the defendant to seize, but to enlarge the defence beyond that, and to put in issue the plaintiff’s right to possession. It was urged, in that case, that there being a plea of not possessed, the defendants being assignees, and claiming the right to the goods, in respect of their being in the order and disposition of the bankrupt, they claimed not the actual property vested in them by the fiat, but the right to take and deal with them; and it was said, that this could not be set up under not possessed: and *Parke, B.*, said, that the defendants might not only say to the plaintiff, “You have no right to bring your action of trover at all,” but that they might go on further, and say, “You have not a property in the goods

plaintiff is possessed of the property as of his own right, and the effect of it is, to put in issue, whether the plaintiff had such a right of property in the goods as to entitle him to bring trover; and the defendant may shew either that the plaintiff has no such right at all against any one, or that he himself has some lien, or some right with respect to the property, which disables the plaintiff from maintaining trover against him. Here the defendants say, by their plea, that the plaintiff had no property at all in the goods, and it is for the plaintiff to establish his right; surely that shews, that if they are proved to be the property of some one else, they are not the property of the plaintiff. This then is clearly evidence on the issue, if the defendants are entitled to set it up; and I do not understand the defendants to be precluded from giving in evidence, that which destroys the plaintiff's right, unless there is some matter of estoppel. An estoppel, however, must arise from something which has taken place mutually between the parties; an estoppel cannot arise on matter, in respect of which either party was previously in the position of a stranger; but the defendants were in that position with respect to the plaintiff. I think, therefore, that the defendants were entitled, in this case, to give the *jus tertii*, in evidence, and that the verdict must be entered for them.

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Rule absolute accordingly.

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SHEE, Serjt., moved for a rule, calling upon the plaintiff to shew cause why the trial of this action had, at the ad-

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 plaintiff gave
 notice of trial
 for the sittings

after term in London, without specifying whether it was intended to try at the first, or at the adjourned sittings, according to the rule of Court, (H. T., 32 Geo. 3, C. P.,) and the defendant became aware of the intention to try at the latter, and took proceedings with a view to have the cause struck out of the list for that sittings, and otherwise shewed that he considered the notice to apply to that sittings, the Court held that although, in strictness, the notice was not conformable to practice, the defendant had waived his objection.

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journd sittings after Trinity Term, 1842, and the verdict then obtained, should not be set aside, with costs. It appeared, that issue being joined in the action, the plaintiff, on the 4th of June, gave notice of trial "for the sittings after this present Trinity Term, to be holden at the Guildhall, London." The sittings commenced on the 15th of June; on the 14th of June, the defendant searched the Marshal's office, and found that the cause was not entered for trial, and a material witness on his behalf thereupon left London; on the 21st of June, the cause was set down in the list of new causes for the adjournment day; on the 24th, the defendant's attorney ascertained this fact at the Marshal's office; on the same day, he was served with a summons, returnable on the 25th, to admit certain documents on the trial, and the plaintiff's attorney informed him of his intention to try at the adjourned sittings, which commenced on the 29th; on the next day, the defendant applied to *Cresswell, J.*, at Chambers, to strike the cause out of the list, but his application was refused; on the 29th of June, the cause was tried as an undefended cause, and the plaintiff obtained a verdict for 63*l*. It was urged, in support of the application, that it was the duty of the plaintiff to specify in his notice of trial, whether the cause was to be tried at the first sittings, or the adjourned sittings, and that not having done so, he was bound

tended to be tried at the first day of such sittings, or the adjournment day." [*Tindal*, C. J.—Formerly, the Judge sat one day, but this has been discontinued]. At all events, the plaintiff ought to have shewn himself ready to act upon his notice, and to have set down the cause, and subsequently, to have made it a remanet. The defendant had been misled, and the motion was founded upon this fact, and on an affidavit of merits.

A rule nisi having been granted,

Channell, Serjt., on a subsequent day, shewed cause. He relied upon the circumstance, that the intention to try at the adjourned sittings, had been brought home to the knowledge of the defendant in ample time for him to be prepared for those sittings; and also, upon the steps taken by the defendant to procure the cause to be struck out of the paper, which amounted to a waiver. He also urged that the notice at the foot of the sitting's paper, could have left the defendant in no doubt as to the cause being intended to be tried at the adjourned sittings. [*Maule*, J.—Is not the notice of trial in direct contravention of the rule of Court?] But the irregularity was waived, for it was obvious on the face of the notice, and the defendant ought to have taken advantage of it immediately.

Shee, Serjt., in support of the rule, contended that the defendant, in applying at Chambers, had only taken such steps as were necessary to relieve him from the suggestion of waiver. The Court would, at all events, make the rule absolute upon a consideration of the fact sworn to, that a material witness was allowed to quit London in consequence of the mistake, and of the affidavit of merits.

TINDAL, C. J.—It is unnecessary, I think, in this case to determine whether the notice of trial here given was,

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or was not, irregular in the particular pointed out; and although it is better, perhaps, that the rule of Court be adhered to, as it has not been altered, still, I think, that the consideration of the defendant's objection does not arise. If there is an irregularity, the objection is made in *extremos apices juris*, for the defendant must have known that there are no causes tried at the first sitting, and must, therefore, have understood the notice to apply to the adjournment day. I think, however, that what has occurred amounts to a waiver. The defendant's attorney learned on the 24th of June, that the cause was set down for the first practicable day, the first day of the actual sitting, and he is further told on the same day, that the plaintiff intends to try the cause. On the 25th, he attends a summons to admit certain documents to be used in evidence on the other side, which shews him that the cause is coming on, and on the same day, he himself takes out a summons to strike the cause out of the list, in order that it may not be tried on the adjournment day. The application was dismissed, and I think that the defendant had full knowledge of the plaintiff's intention to try at the adjourned sittings, and that he has, by his own proceedings, waived the objection which he raises. As the defendant, however, has sworn to merits, there may be a new trial, upon his giving security for the amount of the verdict

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CASE. The declaration, after the usual inducement of plaintiff's good name, &c., stated that whereas the plaintiff, before the committing, &c., had, at the defendant's request, attended a certain child of the defendant's, which was ill, with a view to heal and cure such illness, and that the plaintiff, with such view, and with the consent and permission of the defendant, made up and administered to the said child, in a proper and careful manner, and to the best of the plaintiff's knowledge in that behalf, certain medicines, and amongst others, a certain saline injection: and whereas, afterwards and before the committing, &c., the child died of the sickness, illness, and disorder aforesaid: and whereas also, before and at the time of the happening of the special damage to the plaintiff, as hereinafter mentioned, the plaintiff was an apothecary, and carried on the business of an apothecary with skill and attention, yet the defendant, contriving, &c., on the 1st of January, 1838, in a certain discourse, &c., falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the administering by the plaintiff of the said saline injection to the said child of the defendant, the

In an action on the case for slander, the declaration alleged that the plaintiff, an apothecary, having attended a certain child of the defendant, which was ill, with a view to heal and cure such illness, and having, with the consent of the defendant, made up and administered certain medicines, and amongst others a saline injection, and the child having died of the sickness aforesaid, the defendant contriving, &c., published of and concerning the plaintiff, the following words, "He killed my child:

it was the saline injection that did it:" Inuendo, that the defendant meant that the plaintiff had been guilty of feloniously killing the said child; the defendant pleaded a justification, for that the plaintiff did injudiciously, indiscreetly and improperly, and contrary to his duty in that behalf, administer a certain saline injection to the said child, and that the death of the child was then caused or occasioned, or greatly accelerated by the aforesaid saline injection: *Held*, upon demurrer, that the plea was bad, for that it confessed the meaning imputed to the words spoken, that the plaintiff had been guilty of manslaughter, and afforded no justification for such an allegation.

The second count of the declaration alleged the use of the words "He made up the medicines wrong, through jealousy; because I would not allow him his own judgment:" inuendo, that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines in a wrong and improper manner, and that such medicines were, to his knowledge, unfit and improper: *Held*, that the words as alleged, imputed no criminal offence, and that the count was bad.

The third count alleged the use of the words "Mr. P. told me that he had given my child too much mercury, and poisoned it; otherwise it would have got well." Inuendo, that the plaintiff had, through ignorance or inattention, administered to the said child such an excessive quantity of mercury, that the said mercury had acted as poison, and caused the death of the child: Plea, that the plaintiff did wrongfully and improperly, and contrary to his duty, administer to the said child of the defendant, an excessive proportion of mercury, having reference to the state and condition of the said child: *Held*, that the plea neither confessed nor avoided the charge in the declaration, and was therefore bad.

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false, scandalous, malicious, and defamatory words following, that is to say, "he (meaning the plaintiff) killed my (meaning the defendant's) child; it was the saline injection that did it," thereby meaning the said saline injection; and that the plaintiff had been and was guilty of feloniously killing the said child, by improperly and with gross ignorance, and with gross and culpable want of caution, and without due regard to the safety of the said child, administering to it the said saline injection.

Second count, that defendant, on, &c., spoke and published of and concerning the making up and administering by the plaintiff of the said medicines to the said child of the defendant, the words following: "he (meaning the plaintiff) made up the medicines (meaning the said medicines so made up and administered by the said plaintiff to the said child, as aforesaid) wrong, through jealousy, because I (meaning the defendant) would not allow him (meaning the plaintiff) to use his own judgment," thereby meaning that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines he had administered to the child, in a wrong and improper manner, and that such medicines were thereby, to the knowledge of the plaintiff, unfit and improper to be administered to the said child. By means of which

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tiff) had given my child (meaning the said child of the defendant) too much mercury, and poisoned it, otherwise it (meaning the said child) would have got well (meaning thereby that the plaintiff had, either through ignorance or inattention, and want of caution, administered to the said child such an excessive quantity of mercury, that the said mercury acted as poison, and caused the death of the said child). By means, &c.

Fifth plea, as to the speaking of the words in the first count mentioned, that is to say, "he killed my child, it was the saline injection that did it," actionem non, because, before the speaking, &c., to wit, on the 1st of June, A. D. 1837, the plaintiff professed himself to be an apothecary, duly entitled and qualified to act as such, and the defendant, on the faith of the plaintiff's being so entitled and qualified, and knowing nothing to the contrary, did suffer and permit the plaintiff to attend the said child, who was then sick and disordered, for the purpose of administering to the said child such medicines as might, under the circumstances, be proper; and the plaintiff did then injudiciously, indiscreetly, and improperly, and contrary to his duty in that behalf, administer a certain saline injection to the said child of the defendant, and the said child thereupon and immediately after the said injection had been administered, was thrown into violent convulsions, and was deprived of his speech, sight, and hearing, and effusion of the brain and lock-jaw supervened, and the said child shortly afterwards died. And the defendant averred, that the death of the child was then caused or occasioned, or greatly accelerated, by the aforesaid saline injection so administered to him by the plaintiff as aforesaid; wherefore, &c.

Sixth plea, as to the speaking and publishing so much of the words, in the second count, as imputed to the plaintiff, the having administered to the child of the defendant improper medicines, actionem non, because, before, &c. the plaintiff professed (as in the first plea); and that the

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plaintiff did then, improperly and contrary to his duty in that behalf, administer to the said child of the defendant divers large quantities of medicine, the same being then of an injurious nature, and unfit for the complaint under which the said child then suffered, as in the second count mentioned; wherefore, &c.

Seventh and last plea, as to speaking and publishing so much of the words in the last count as imputes to the plaintiff the having given the said child too much mercury, actionem non, because, before, &c. the plaintiff professed, &c. (as in former pleas) and the plaintiff did then wrongfully and improperly, and contrary to his duty in that behalf, administer to the said child of the defendant, divers large quantities of mercury, to wit, fifty grains, the same being an excessive proportion thereof, having reference to the then state and condition of the said child; wherefore, &c.

To each of these pleas there was a special demurrer. To the fifth, because it assumed to answer the words in the first count, in a sense different from that in which they were alleged to have been spoken, and because it severed the inuendo from the words themselves, and that it did not justify the imputation of manslaughter charged therein. To the sixth and seventh, for severing and dividing the

Mountney v. Watton (a), was in point. There, the libel charged a felony, and the plea justified the words, and stated the facts from which the imputation was deduced; and Lord *Tenterden* said, "If the words alleged did not amount to a charge of felony, the defendant would have succeeded on the general issue; but if they do impute felony, as the declaration charges, then a justification, setting out certain grounds for suspecting the plaintiff of felony, can be no answer." The sixth plea was also bad, for it set up a justification of a part of the second count, to which it was pleaded, which imputed no crime in law. It would be argued, however, that the count itself was bad, for that the words alleged to have been used, imputed no offence punishable by law, and were not actionable. The effect of the words charged was, that the plaintiff had knowingly and wilfully made up and administered to the child of the defendant improper medicines. [*Tindal*, C. J.—There is no allegation that by reason of administering such improper medicines the child died, or got worse. *Maule*, J.—For anything that appears, the child may have got better. There may have been a wrong intention to administer, but the medicines may have been proper, for, the child's condition may have altered. *Coltman*, J.—Is there any crime imputed which is punishable at law?] *Mala praxis*, at all events, was imputed, and if death had ensued therefrom, the plaintiff would have been indictable for manslaughter. An act unlawful in itself was, however, punishable irrespective of its consequences, and, therefore, the plaintiff would still be punishable, though death had not ensued. The administering of improper medicine, besides, might be treated as an assault, *Rex v. Rosinski* (b). [*Maule*, J.—Supposing a man employed in lowering bales of goods from a warehouse into the street, if, in consequence of gross carelessness, he suffered one of

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(a) 2 B. & Ad. 673.

(b) 1 Moo. C. C. 19.

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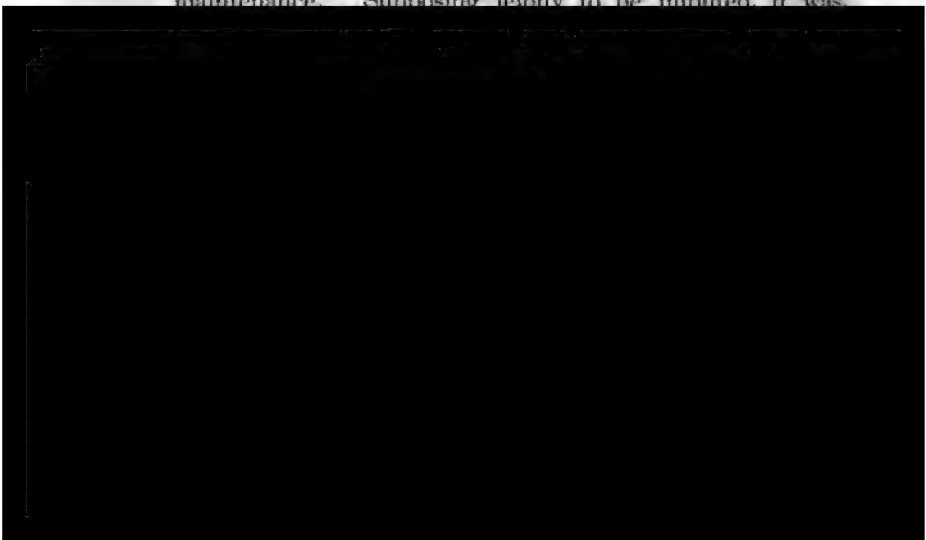
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them to fall, and a passenger was killed, he would be indictable for manslaughter. But, supposing that no one was hurt, would he still be indictable?] The general principle of law was, that the amount of injury done could not be taken as the criterion of criminality. Here, there was a wrong alleged in the improper administration of medicines. The seventh plea was also bad, for it attempted to justify the words alleged in a sense entirely different from that charged, and for that it did not confess and avoid the allegations of the count.

Talfourd, Serjt., for the defendant. The first count amounted only to this, that the saline injection was the cause of the child's death, and that was justified by the plea. [*Tindal*, C. J.—By the plea, the defendant admits that the word “killed” bears the meaning which the plaintiff has given to it.] In Lord *Cromwell's* case (a), it was laid down, that “in the case of slander by words, the sense of the words ought to be taken *secundum subjectam materiem*. And though the defendant varies from the plaintiff in the sense and quality of the words, yet it is no cause to drive him to the general issue; as in maintenance, the plaintiff charges the defendant with unlawful maintenance, the defendant may justify by reason of lawful maintenance.” Supposing felony to be imputed, it was



Channell replied.

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TINDAL, C. J.—The question which arises upon the first count is, whether the plea pleaded to that count is a sufficient answer, and this involves the consideration of the meaning of the count; and I think that the word “killed,” which is alleged, when taken with the inuendo, must be taken to constitute an offence. In order to decide this question, we must couple the words charged with the statement which is made in the declaration, that the words mean “that the plaintiff had been and was guilty of feloniously killing the said child, by improperly and with gross ignorance, and with gross and culpable want of caution, and without due regard to the safety of the said child administering to it certain medicine.” That alleges the legal offence of manslaughter, and the question is, whether the plea confesses and avoids the charge which is made? I think that the defendant, for the purpose of pleading, must be taken to have employed the words in the sense imputed, and it must be taken that he has so admitted: and then, if you look at the plea, it in reality amounts to no more than a justification of want of care and caution. It cannot be said, however, that the want of every care and caution, whatever the result may be, amounts to manslaughter; but only the gross want of that degree of care and skill, which every one who undertakes the exercise of any particular art or profession, is supposed to bring with him in each case. The plea states that the plaintiff did “injuriously, indiscreetly, and improperly, and contrary to his duty in that behalf, administer a certain saline injection to the said child of the defendant, and the said child thereupon and immediately after the said injection had been administered, was thrown into violent convulsions, and was deprived of his speech, sight, and hearing, and effusion of the brain and lock-jaw supervened, and the said child shortly afterwards died; and the defendant avers that the death of the child was then caused or occasioned, or

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greatly accelerated by the aforesaid saline injection so administered to him by the plaintiff." Now, what is this more than a statement of want of judgment? It certainly does not amount to the crime with which the plaintiff alleges the defendant to have charged him, and the plea is bad, because it confesses the words to have been used in the sense imputed, and does not justify them in that sense. With regard to the second count, I have entertained some doubt whether the words charged therein do or do not impute a criminal offence. Perhaps by a nice application of construction, they might be considered as approximating nearly to a criminal charge, but it is for the plaintiff to make out that they bear the libellous sense imputed. The words are "he made up the medicine wrong through jealousy, because I would not allow him to use his own judgment." It is not said that the medicines, in fact, caused any injury to the child, but only that they were "made up wrong through jealousy," and whether they were noxious, or innocent or advantageous, is left in doubt. In order to sustain an indictment for mala praxis, it should be shewn either that there was gross negligence, or that the party knew at the time that great mischief would be likely to arise from what he did. But here I do not think that the words convey a charge of crime, and I am of opinion that on the second count the defendant is entitled

plea, however, only alleges that the plaintiff did wrongfully administer excessive doses of mercury, and does not say that they were such as poisoned the child. Therefore it does not confess and avoid the matter laid in the declaration. The fifth plea is, therefore bad, for confessing and not avoiding; the seventh plea is also bad, for neither confessing nor avoiding. The plaintiff is entitled to judgment on the demurrers to the fifth and seventh pleas, and the defendant, by reason of the insufficiency of the second count, is entitled to judgment on the demurrer to the sixth plea.

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COLTMAN, J., concurred.

ERSKINE, J.—I also am of opinion, that the first count alleges a substantial criminal offence to have been charged, and that the plea pleaded to that count, affords no answer to it. The words of the libel, impute the “killing” of the child, and in the inuendo, this is said to be a felonious killing, and in the plea there is nothing shewn, which tends to rebut the presumption, that such is the meaning intended to be conveyed. Even to support the argument which is raised on *Lord Cromwell’s case*, the plea should have gone on to shew that the words were spoken in a sense different from that which is imported into them. The second count, I think, is defective, as it does not shew that any injury resulted from the medicines administered, and also as it does not shew any offence which could be made the subject of an indictment. I am also of opinion, that the plea to the third count is bad for the reasons already stated.

MAULE, J.—I think that the plaintiff is entitled to judgment on the demurrer to the pleas to the first and third counts; and I am also of opinion, that the second count in the declaration is bad. It is to be observed, that that count only charges that the defendant had imputed to the plaintiff, that he made up the medicines wrong through jealousy,

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and the inuendo is, that the defendant thereby meant that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines he had administered to the child, in a wrong and improper manner, and the medicines were unfit to be administered. Taking the charge and inuendo together, they do amount to an allegation of administering, and that is all; for it is not said, that the plaintiff meant any harm to the child; and if no harm was done or intended, it would be no offence to make up medicines in a wrong and improper manner. It has been said, that an administering of medicines is an assault; but I do not agree that it is necessarily so in every case. With respect to the fifth plea, I think it is obvious, that it does not profess to answer the words charged in the declaration, in the sense imputed to them. It does not indeed select anything from the first count, which amounts to a cause of action, and answer it, and on that ground it would also be bad. The charge conveyed must be taken to be manslaughter, and there is no justification of words alleging such an offence; Lord *Cromwell's case* is not like the present. The rules of pleading which then obtained, were not very like those now in use, and the plea there spoken of seems to me to be very like that species of plea which is held to give implied colour. Here, however, the plea alleges that the plaintiff administered the medicine inin-

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DOWLING, Serjt., shewed cause against a rule obtained in this case, for the discharge of the defendant out of the custody of the Marshal of the Queen's prison, under the 48 Geo. 3, c. 123, upon the ground that the defendant had been during the twelve months next preceding the time of making the application, in execution upon a judgment for a debt not exceeding the sum of 20*l*. It was objected that this rule must be discharged, for that the application was made by the Marshal, and not on behalf of the defendant. The statute upon which the motion was founded, was passed for the relief of prisoners in execution for small debts; and section 1 enacted, that "all persons in execution upon any judgment in whatsoever court the same may have been obtained, &c., for any debt or damages not exceeding the sum of 20*l*., exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon, for the space of twelve successive calendar months, next before the time of their application to be discharged as hereinafter mentioned, shall and may upon his, her, or their application for that purpose in Term time, made to some one of her Majesty's superior Courts of record at Westminster, to the satisfaction of such Court, be forthwith discharged out of custody as to such execution, by the rule or order of such Court." If the defendant had made this application, there would have been no difficulty; but he could not be forced to accept his discharge. The plaintiff could not make such an application, and no peculiar power was given, in this respect, to the Marshal, by the 5 & 6 Vict. c. 22.

A defendant in execution for twelve months for a debt not exceeding 20*l*., cannot be compelled to accept his discharge under the 48 Geo. 3, c. 123. Therefore, where an application for the discharge of such a defendant, was made by the Marshal of the Queen's prison, and cause was shewn against the rule, the motion was dismissed with costs.

Channell, Serjt., *contra*, admitted that such an application by the Marshal, did not appear to have been previously made, but submitted that the words of the statute did not

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necessarily prevent it, and it might be very expedient for the Court to interfere in certain cases, as suggested.

PER CURIAM.—The statute was obviously passed for the benefit of defendants, and it enacts in terms that the application shall be made by them. There are no facts here shewn to raise the question of expediency which is contended for on the part of the applicant, and the rule must be discharged, with costs.

Rule discharged, with costs.

PIERPOINT v. GOWER.

T. P., in November, 1840, gave a warrant of attorney to N. P., for 1000*l.*, together with interest for the same, at the rate of 5*l.* per cent., per annum, from the 1st of July, in the same year. In October,

THIS was an action of trover, brought by the plaintiff against the defendant, the late sheriff of the county of Surrey, to recover certain property consisting of household furniture, &c., seized by the defendant under a writ of execution, issued at the suit of one Brewer, against the father of the plaintiff. The cause being at issue, came on for trial before *Tindal*, C. J., at the London sittings after Easter Term, 1842. It then appeared, in support of the plaintiff's case, that in the month of June,

which it was to become void on payment by Thomas, the father, of 1000*l.*, together with the interest, at the rate of 5*l.* per cent. per annum, from the 1st of July in the same year. The warrant of attorney was duly filed, and a copy of it was produced; the original was proved to bear a 5*l.*, ad valorem stamp. It further appeared that the plaintiff, not being satisfied with the security afforded by the warrant of attorney, further took a bill of sale from his father, securing to him the property which formed the subject of the present action. The bill of sale was dated the 30th of October, 1841, and having recited the warrant of attorney, proceeded to state that the sum of 1000*l.*, thereby secured, still remained due and unpaid, and that the said Thomas Pierpoint agreed to assign over for further securing the re-payment of the same sum, and interest for the same, certain household property, "provided, nevertheless, that in case the said Thomas Pierpoint should well and truly pay over to the said Nathaniel Pierpoint, the said sum of 1000*l.*, with interest for the same, after the rate of 5*l.* per cent. per annum from the 30th of November, 1840, being the day up to which the interest on the said sum of 1000*l.* had been paid," then, &c. The bill of sale bore a common 1*l.* 15*s.* deed stamp. The bona fides of the transaction being established, the defendant applied for a nonsuit, on the ground that the instruments proved in evidence were not sufficiently stamped, but the objections being overruled, the jury returned a verdict for the plaintiff.

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Talfourd, Serjt., in Trinity Term, pursuant to leave reserved, moved for a rule, calling upon the plaintiff to shew cause why this verdict should not be set aside, and a nonsuit entered. By the 55 Geo. 3, c. 184, sched. p. 1, under the head "mortgage," it was directed that any deed, "whether the same be made as a security for the payment of any definite and certain sum of money, advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable exceeding 500*l.*, and not exceeding

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1000L," shall pay 5L. It was under this provision, that the warrant of attorney had been stamped. By the same schedule, under the head of "exemptions," was included "any deed or other instrument, made as additional or further security for any sum or sums of money, or any share or shares of any stocks or funds before mentioned, already secured by any deed or instrument, which shall have paid the ad valorem duty hereby charged, &c., to be exempt from the said ad valorem duty hereby charged, so far as regards sum or sums of money, or such share or shares of any of the said stocks or funds before secured, in case such additional or further security shall be made by the same person or persons who made the original security; but if any further sum of money or stock be added to the principal money or stock already secured, or shall be thereby secured to any other person, the said ad valorem duty shall be charged in respect of such further sum of money or stock." By the 3 Geo. 4, c. 117, s. 3, it was enacted, "that where any deed or other instrument already made, or hereafter to be made, as an additional or further security for any sum or sums of money, or any share or shares in any government or Parliamentary stocks or funds, &c., already or previously secured by any bond on which the ad valorem duty on bonds charged by the 55 Geo. 3 c. 184, and the 56 Geo. 3, &c. shall have been

a deed in furtherance of the object of such a security, but such a deed must bear an ad valorem stamp for the full amount applicable to the sum secured by it. Secondly, assuming the stamp on the bill of sale to be sufficient in this point of view, it was objectionable because that was not an instrument for the security of the "definite and certain sum" of 1000*l.*, but included a "further sum" added to the "principal money already secured," and was liable to an increased amount of duty in respect of such further sum. It professed to secure, not only the sum of 1000*l.*, but an indefinite amount of interest, part of which had already accrued due, and the amount of which could be ascertained. The test by which the nature of the deed should be tried was this: would it be satisfied by the payment of the 1000*l.* only? It would not, and it was, therefore, a deed for the security of a further sum.

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A rule nisi having been granted,

Bompas, Serjt. (with whom was *Pearson*) now shewed cause. First, a warrant of attorney was clearly an instrument within the meaning of the provisions of the 55 Geo. 3, c. 184, and the 3 Geo. 4, c. 117, s. 3. In the schedule of the former act, under the title "warrant of attorney," such a security was classed among bonds, and the stamp imposed was determined to be "the same as on a bond for the like purpose," and there could be no doubt that the Legislature viewed a bond and a warrant of attorney in the same light, and as instruments of equal value. Secondly, *Barker v. Smark* (a) was a clear authority that interest secured by a deed did not constitute such a "further sum" as took the case out of the exemption referred to, whether that interest had accrued due, and its amount was ascertainable, or whether it had yet to become due. There, a bond was given to secure not only the principal sum of 3000*l.*, but also bygone interest from a previous

(a) 7 M. & W. 590.

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day; the bond bore a 7*l*. stamp, and it was objected that "the definitive and certain sum of money" secured exceeded 3000*l*., and that an 8*l*. stamp was necessary under the schedule of the 55 Geo. 3, c. 184. *Parke*, B., in giving judgment, expressed an opinion that the stamp was sufficient, and having referred to the words of the act, said, "I construe those words to mean the sum ascertained by the bond itself—in other words, the principal sum. It is true, at the time of the execution of the bond in this case, a sum was due for interest, which was ascertainable; but the amount of interest is not mentioned in the bond, and must depend on the time when it is paid. I think the words "definitive and certain sum," refer to the principal money secured by the bond, which is to bear interest, and not to interest, whether bygone or subsequent. *Robinson v. M^cDonnell* (a) was also referred to.

Talfourd, Serjt., in support of the rule. The objection to the sufficiency of the stamp applied itself properly to the warrant of attorney: and the warrant of attorney contained the same terms which were incorporated into the bill of sale, and secured not only the principal money, but interest from a bygone date. *Barker v. Smark* would no doubt apply, if this were the case of a bond; but the case of a bond was distinguishable from that of a warrant of attorney.

TINDAL, C. J.—I think that *Barker v. Smark* is decisive on this question; on general principle, the language of the Legislature must be very clear, before a double stamp is imposed. In this case, the stamp is sufficient.

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Rule discharged.

GROOM v. WORTHAM.

MANNING, Serjt., moved for a rule, calling on the defendant to show cause why a plea pleaded by him to this action should not be set aside. The action was brought against an attorney, and the defendant had pleaded by attorney, that he was and is one of the attorneys of the Court of Queen's Bench, and as such, ought to be sued in that Court, and that he was not an attorney of this Court. It was urged, that this was, in substance, a plea to the jurisdiction, and that it ought to have been pleaded in person.

A plea by an attorney, defendant to an action in this Court, that he is an attorney of the Queen's Bench, and not of the Common Pleas, must be pleaded by attorney, and not in person.

TINDAL, C. J.—The defendant must come here by his attorney: the very ground of his objection is, that he cannot come himself. *Hunter v. Neck* (a) is against the application.

MAULE, J.—We cannot compel a man to come here, for the purpose of saying that he cannot come.

Rule refused.

(a) 3 Scott, N. R. 448.

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BRISTOWE v. NEEDHAM.

Where a plaintiff was resident out of the jurisdiction, the Court discharged a rule for security for costs, on the plaintiff's consenting to set off any costs to which he might become liable in the action, against a judgment obtained by him against the defendant.

WILDE, Serjt., shewed cause against a rule nisi, obtained by *Channell*, Serjt., why the plaintiff should not give security for costs, on the ground that the plaintiff was out of the jurisdiction, residing in the Island of Jersey. It appeared by the affidavits, in answer to the rule to be admitted, that the plaintiff was so out of the jurisdiction, but that he had obtained judgment for 20,000*l.* against the defendant, which judgment still remained unsatisfied. This it was contended, was a sufficient security to the defendant for any costs to which the latter might become entitled, in case the plaintiff should not succeed in the present action.

Channell, Serjt., in support of the rule, submitted, that the plaintiff must consent to set off the costs, to which he might become liable in the present action, against the judgment which he had obtained against the defendant.

TINDAL, C. J.—The rule may be discharged on those terms.

COLTMAN, J., **ERSKINE**, J., and **MAULE**, J., concurred.

the trial of this action should not be set aside, and a new trial had. The declaration was in debt, and the first count having alleged the making of a promissory note by the defendant, claimed a sum of 19*l.* 18*s.* 6*d.* in respect of interest due upon that instrument: the second count claimed a general sum of 30*l.* for interest on the same note; and the third count was on an account stated. The defendant pleaded to the first count, except as to 7*l.* 9*s.* payment; and secondly, as to 7*l.* 9*s.* payment into Court: as to the second count, payment, and as to the third count, *nunquam indebitatus*. The particulars of the plaintiff's demand shewed a claim of 19*l.* 18*s.* 6*d.* for interest due upon the note in the declaration mentioned up to the 20th of December, 1841. The cause was tried before the under-sheriff of the East Riding of the county of York, when it was agreed between the attorneys for the respective parties, that the whole amount of interest which had accrued due upon the note from the time of its maturity down to 20th of December, 1841, was 75*l.* The plaintiff admitted that his demand was reduced from 19*l.* 8*s.* 6*d.* to 12*l.* 9*s.* 6*d.*, by the payment of 7*l.* 9*s.* into Court. The defendant called witnesses to prove the payment to the plaintiff of various sums amounting to 62*l.*, and the jury found for the plaintiff damages 5*l.* 11*s.*, which, together with the 62*l.* paid to the plaintiff, and the 7*l.* 9*s.* paid into Court, completed the total amount of 75*l.*, which, as before stated, the parties admitted to have accrued due upon the note in the shape of interest since the period of its falling due. It was now objected that this finding was incorrect, and that the plaintiff's demand of 19*l.* 18*s.* 6*d.* was covered by the sum of 62*l.*, proved by the defendant to have been paid. Either the plaintiff should have claimed in his declaration the total sum of 75*l.* or, finding a plea of payment pleaded by the defendant, he should have new assigned, shewing that he claimed sums beyond those which had been paid to him by the defendant.

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TINDAL, C. J.—The payments must be viewed in reference to the periods at which they were made. The plaintiff says, "I now claim only 19*l.* 18*s.* 6*d.*," and the defendant objects that he is in error, because he confines his demand to that which he actually claims to be due. I do not think he was called upon to new assign, but I think that it is obvious that the demand was for the balance of an account. This case is like *James v. Lingham* (a). There, the plaintiff declared in debt for 100*l.* due for work and labour, and on an account stated: plea, payment of 100*l.* in satisfaction of the causes of action mentioned in the declaration. Plaintiff proved that 96*l.* 17*s.* 11*d.* was due to him for the balance of his account, after giving credit for the 100*l.* which he had received; and it was held that the plea was not proved, and that the plaintiff need not new assign.

The rest of the Court concurred.

Rule refused (b).

(a) 5 Ring. N. C. 553; S. C. 7 Scott, 603.

(b) Vide *Eastwick v. Harman*, 6 M. & W. 13; S. C. *Ante*, vol. 8, p. 399, O. S.; *Freeman v. Crafts*,

4 M. & W. 4; S. C. *Ante*, vol. 6, p. 698, O. S.; *Rogers v. Custance*, 1 Q. B. 77; S. C. 4 P. & D. 574.

attorney, and the sum of 8s. 6d., paid to the officer of the sheriff of Surrey, by the defendant on his arrest on the *capias ad satisfaciendum* issued in this action, should not be refunded; and why the plaintiff should not pay the costs of this application. The motion had been made upon the affidavit of the defendant, who described himself as an attorney at law, and he stated that he had a private residence at Walworth, but carried on his profession or practice at No. 21, Carey-street, Lincoln's Inn Fields; that on the 14th of November, he started from his private residence at a little after 10 o'clock in the morning to go to his office to procure his papers, to be in readiness to attend at Westminster in this Court, on the argument of a motion to make absolute a rule nisi in a cause of *Webb v. Bulkeley*, in which he was plaintiff, and which papers he believed were material and necessary for the purpose of enabling his counsel to support the rule; that while he was pursuing his way in a direct line from Walworth to his office, and when near the Elephant and Castle Inn, at Newington, he was arrested by an officer of the sheriff of Surrey, at the suit of the plaintiff in this action; that he acquainted the officer that he was going to Carey-street, for the purpose already described, but that he was nevertheless conveyed to a lock-up house, where he remained until seven o'clock the same day; that he immediately caused an application to be made to a Judge at Chambers to procure his discharge, but that finding that proceedings in *Webb v. Bulkeley*, could not be successfully carried on without his personal appearance in Court, and that a summons at Chambers could not be made returnable until the next day, he deemed it advisable to pay, and accordingly did pay, under protest, the debt and costs in the action in which he was arrested.

Andrews, Serjt., now shewed cause, and produced affidavits, from which it appeared that the defendant, at the

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time of his discharge, was in a street near the Queen's prison, and, it was contended, not in a direct line from Walworth to Carey-street, over Blackfriars Bridge. It was objected, first, that the defendant, if he sought to ground his application upon his privilege as an attorney, had not brought sufficient materials before the Court, for that he did not swear that he was practising under a certificate, or that he was in the position of an attorney lawfully authorized to practice. [*Tindal*, C. J.—Would that appear in a plea of privilege (*a*)?] In *Chitt. Arch.* 468, cases were cited to shew that an attorney who had left off practice (*b*), or who had not taken out his certificate for one whole year (*c*), was not entitled to his privilege. [*Erskine*, J.—Those cases do not shew that a party coming to the Court, must swear that he has duly taken out his certificate. *Tindal*, C. J.—It is very easy for you, if you think the attorney has not taken out his certificate, to ascertain whether he has or not; but why is a man to state that which is matter of defence,—that he is not practising without a certificate?] The fact of the applicant being a practising attorney, duly authorized, was the very gist of the motion; for unless he was so, his privilege did not arise. [*Tindal*, C. J.—You can hardly look at his affidavit without seeing that he is a practising attorney; for he describes himself as an “attorney at law,” and he says

was the nature of the motion which he was coming to attend ; but, further, it was shewn that he was not on his way to Westminster, but to his office in Carey-street ; and also, that he had not even taken the direct route to that place, for, the Queen's prison lay to the right of the direct line of road from the Elephant Castle by a full quarter of a mile. [*Maule, J.*—Would the circumstance of a man's going out of his way from ignorance of the road, or from a misconception on the subject of which was the shortest way (*a*), take away his privilege ?] The proper path for the defendant to have taken was over Westminster Bridge to this Court.

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Manning, Serjt., in support of the rule, cited *Pitt v. Coombs* (*b*), where the plaintiff, on his way from Court, called at the office where he kept his papers, but did not reside, to refresh himself ; he remained there nearly two hours, and then went into a tailor's shop in the same street, where he was arrested ; and it was held, that his privilege as a party redeundo had not then ceased.

TINDAL, C. J.—There has been no argument offered to shew that this applicant is not entitled to his privilege as a party to the suit, in which he was coming to attend the Court. Then, that being so, it appears that he was going to his office to get some papers which were material to the purposes for which he was coming to the Court. The only question is, whether he had really and substantially gone out of his way in going to his office ? We ought to see clearly that he had. It seems to me, however, that this case falls within the principle of *Pitt v. Coombs*, and the observations of Lord *Denman* there, and that this rule must be made absolute.

(*a*) It may be a question whether the defendant had not taken the shortest route.

(*b*) 3 Nev. & M. 212, 566 ; S. C. 5 B. & Adol. 1077.

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Andrews prayed that a term might be imposed on the defendant, that no action be brought.

PER CURIAM.—That term must be imposed.

Rule absolute accordingly.

DARLINGTON v. PRITCHARD and Another.

In trespass for breaking and entering the plaintiff's dwelling-house, the defendants F. and M., justified the trespasses, the former as owner in fee, the latter as his servant; plea also by the latter, not guilty: Replication, nolle prosequi as to F.; but alleging an estoppel as to M., for that before the trespasses, &c.,

CHANNELL, Serjt., moved for a rule, calling upon the plaintiff to shew cause why the verdict found for him at the trial of this action, should not be set aside, and a nonsuit entered, or why the judgment should not be arrested. The declaration was in trespass, and charged the two defendants, Francis and Martha Pritchard, with breaking and entering the dwelling-house of the plaintiff, seizing his goods and chattels, and expelling the plaintiff therefrom. First plea, jointly by the two defendants, justified the trespasses in the declaration mentioned; for that the premises in question were part of a certain manor, and that they had been granted to the defendant, Francis, in fee, and that he entered into the same, and became and was seised and possessed thereof, in his demesne as of fee; and then the plea, having given colour to the plaintiff.

nolle prosequi; secondly, as to the plea of the defendant, Martha, first pleaded by way of estoppel, that the said defendant ought not to be admitted to plead the same, or so much thereof as alleged that the defendant, Francis, was seised, &c., because, before the committing of the trespasses, &c., the said Martha demised the premises in the declaration mentioned, to the plaintiff to hold the same for one whole year, and so from year to year, at a certain rent, &c., which demise continued in full force and undetermined, until at and after the time of committing the said trespasses, &c. The plea concluded with a verification, and a prayer of judgment whether the said Martha should be permitted to plead the said plea. Rejoinder, by Martha, that the tenancy of the plaintiff in the declaration mentioned, was not in full force and undetermined at the said time when, &c. The cause was tried before *Erskine, J.*, at the Summer Assizes, 1842, for the county of Salop, when it appeared that the defendant, Martha, was the mother of Francis. It was proved in evidence, that in March, 1836, Mrs. Pritchard had let the house in question to the plaintiff, at a yearly rent of 16*l.*, and that under that letting, rent had ever since been received by her. A notice to quit, addressed to the plaintiff, and signed in the names of both defendants, was then put in; and then a complaint to the magistrates, under the 1 & 2 Vict. c. 74, s. 1, which was signed by the defendant, Francis, only, but was signed in his name "as for himself and his mother, either or both of them." The entry, which was the trespass complained of, was made under a warrant granted by justices on this complaint, but the warrant had been lost, and it was sworn that it contained the name of only one complainant; the defendant, Martha, was not present at the entry; possession of the premises was retained by the officer for some time, and when he retired, he conveyed the key to the defendant, Martha, who received it from him. It was further shewn, that the defendant, Francis, at that time, lived at a distance of some miles; subsequently,

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the house lately occupied by the plaintiff, was opened as a shop, over which the names "Pritchard and Son," were painted; the defendants were the only persons of that name in the village. The jury found for the plaintiff, damages 90*l*. It was now argued that there was no evidence to support the plaintiff's case, or to connect the defendant, Martha, with the trespass, for that the entry appeared to have been made upon legal process, sued out at the instance, and by procurement of her son, whose title was admitted. Secondly, it was contended that the action was misconceived, for that *case* was the proper remedy for the plaintiff, and not *trespass*. The defendant, Francis, was the applicant to the justices for a warrant, and although his application was made in the joint names of himself and mother, yet, as he had title, he was authorized to apply, and the process granted was regular. That being so, the rule, that where an injury was committed through the medium of, and under legal process, *case* was the remedy applied (*a*). But it might also be argued, that as against Martha, trespass would not lie. Taking the application to have been made by her, it was not warranted by the statute, and the magistrates, therefore, had no jurisdiction. Thirdly, the authority of Martha, as servant of Francis, was admitted on the record; the plea distinctly alleged that authority, but the replication took no notice

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reserved, or for a new trial; and secondly, in arrest of judgment, on looking at the whole of the record. It is an action of trespass brought by the plaintiff against the two defendants, Martha and Francis Pritchard, and there is first a plea by both defendants of not guilty; secondly, a justification under Francis as the owner, and by Martha as his servant, alleging that she, by his command, entered and committed the trespass; in the replication, a *nolle prosequi* is entered as to Francis, and then there is a plea as to Martha, in which an estoppel is set up as against her by reason of a demise which she had made to the plaintiff as tenant from year to year, which tenancy is said to be still continuing; and this is pleaded as an estoppel, because on the face of the pleadings no interest could be possessed, if Francis is the owner of the premises. The jury found a verdict for the plaintiff. The first question is, whether there is evidence on the face of the Judge's notes to shew that that verdict is authorized, or whether it should be disturbed: and I see no reason for disturbing it. I think, on a consideration of the evidence on the Judge's notes, that it appeared that the defendant, Martha, had given notice to the plaintiff that she meant to apply under the 1 & 2 Vict. c. 74, and that in point of fact, she soon afterwards signed a notice to the magistrates to obtain a warrant, and there was evidence to shew that Martha had assented to the proceedings more particularly, for she was afterwards treated as the owner of the premises by the key of them having been delivered to her, she living more immediately in the neighbourhood than her son. Therefore, on the first point, I think that the rule must be refused, for that there was sufficient evidence to satisfy the jury, and to justify their verdict. But it is said, secondly, that the action is misconceived, for that it should have been *case* and not *trespass*, and that it was an improper occasion for applying to the magistrates, who had no jurisdiction under the act. But the 3rd section provides, "that in every case in which the person to whom any such warrant shall

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be granted had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant; and in case any such tenant or occupier will become bound with two sureties as hereinafter provided, to be approved of by the said justices, in such sum as to them shall seem reasonable, regard being had to the value of the premises and to the probable costs of an action, to sue the person to whom such warrant was granted with effect and without delay, and to pay all the costs of the proceeding in such action in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action, or become nonsuit therein, execution of the warrant shall be delayed until judgment shall have been given in such action of trespass; and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs in the said action of trespass." In section 6, a distinction is taken between *trespass* and *case*, for it says, "That where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the

my brother *Channell* to be this, that there is in the plea of Martha and Francis an allegation that Francis was the legal owner, and was entitled to possession, and that Martha was his servant, and by his command committed the trespass, and then it is said that this is not denied by the replication. But if you look to the state of the pleadings, it is very true that it is not denied, but the replication is that Martha ought to be estopped from setting up the plea. The very doctrine of estoppel is this, that the party admits the facts quatenus, but that they do not amount to an answer; as if he said, "such is your plea, but you are estopped by law from putting it on the record." On the whole, therefore, I think the rule ought not to go.

Rule refused.

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COURT OF QUEEN'S BENCH.

Hilary Term.

IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

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WATSON v. MATHEWS.

Where the affidavit in support of a motion for judgment on an old warrant of attorney, stated that the deponent verily believed the defendant to be now living, "having seen him" on a certain day, without stating that he had seen him alive; the Court held it to

LEAHY moved for judgment on an old warrant of attorney. The affidavit in support of the motion, stated, that the deponent "verily believed that the said Stephen Mathews is now living, this deponent having seen him on the 16th instant."

WILLIAMS, J.—That will not do. The deponent does not say that he saw the defendant alive. There is a case of *Chell v. Oldfield (a)*, where the same defect arose, and my Brother *Patteson* held that the affidavit was insufficient. The learned Judge said there, "It must be positively sworn that the defendant was seen alive." There was a

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CHAMBERS v. BRIANT.

C. SAUNDERS shewed cause against a rule for judgment as in case of a nonsuit. He was proceeding to use an affidavit, when

A rule nisi for judgment as in case of a nonsuit having been enlarged upon the terms that all affidavits to be used in shewing cause, should be filed one week before the ensuing Term: the Court nevertheless allowed the plaintiff to shew cause upon an affidavit sworn and filed for the purposes of the motion to enlarge.

Butt, in support of the rule, objected. The rule had been enlarged from the last Term, and by the terms of the rule for the enlargement, it was directed that any affidavits intended to be used on shewing cause, should be filed one week before the present Term. No affidavits had been so filed.

But where a rule having been enlarged, for the purpose of obtaining affidavits, the party shewing cause, produced no fresh affidavits, but relied upon that on which the motion for enlargement was made, the Court discharged the rule only, on payment of the costs of the enlargement.

C. Saunders. The affidavit about to be used was the same on which the rule had been enlarged; and contained matters on which the plaintiff sought to discharge the present rule, upon a peremptory undertaking. [*Williams, J.*—I think that the affidavits being on the files of the Court, may be read for the purposes of this motion.] The excuse offered by the affidavit, for not going to trial, was the absence of a material witness for the plaintiff. This fact was stated upon the information and belief of the town agent of the plaintiff's attorney, it being a country cause.

Butt. The rule upon the affidavit now produced, would only be discharged upon payment of costs; for if the same affidavit was now used, which had been sworn for the purpose of enlarging the rule, it was obvious that no enlargement was necessary.

Saunders, contra. The rule for judgment was obtained on the last day but one of Michaelmas Term, and called upon the plaintiff to shew cause peremptorily upon the morrow. The town agent could then only state his belief, as to the cause which had operated to prevent the trial of the action; but subsequent inquiries had confirmed his statement. It

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would not have been safe for the parties to shew cause upon such an affidavit, in the first instance.

WILLIAMS, J.—It is plain, that if the affidavit is worth anything, it might as well have been used at the time of the motion for the enlargement, as now, for the purpose of shewing cause. Instead of depending upon it, in the first instance, however, it was then thought prudent to get something stronger; but now the time has come for the production of a fresh affidavit, and yet none is brought forward. The appearance of the plaintiff to-day, upon the same affidavit which was before used, shews that the enlargement of the rule was unnecessary. I think that the rule must be discharged upon a peremptory undertaking, but upon payment of costs occasioned by the enlargement.

Rule discharged accordingly.

Doe dem. Sir R. FITZWYGRAM v. ROE.

Where upon a
motion for
judgment
against the
casual ejector

PEACOCK moved for judgment against the casual ejector. The difficulty was this; at the time of service of the declaration and notice, the clerk to the attorney of the

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REGINA v. EDWARD ROGERS, Esq. and Others, Justices
of the City of Radnor.


J. E. DAVIS moved for a rule, calling on Edward Rogers, Richard Price, Esquires, and James Richard Brown, David Rodney Murray, and John Price, clerks, justices of the peace for the city of Radnor, to shew cause why a writ of mandamus should not issue to them, commanding them, or any two of them, to take the examination of John Jones, a pauper, chargeable to the parish of Llanfihangel Rhydithon, in the said county, touching the last legal place of settlement of himself, his wife, and children; and thereupon, if it should appear that the last legal place of settlement of the said John Jones and family was in the parish of Blethvaugh, in the same county, to grant an order for the removal of the said pauper, his wife and children, to the said parish. From the affidavits upon which the motion was founded, it appeared that the pauper, with his wife and eight children, had become chargeable to the parish of Llanfihangel Rhydithon, where they were residing in the month of October, 1842. On the 3rd of November, the pauper, John Jones, was taken before the magistrates named, who were assembled in petty sessions at Knighton, in order that his examination might be received; and the examination having been reduced to writing by the clerk of the justices, the pauper was sworn thereto by Mr. Rogers and Mr. R. Price. From the examination, it appeared that in 1818 the pauper rented a farm, house, &c. in the parish of Blethvaugh, at an annual rent of 16*l*.; that he occupied and paid rent for the same during a period of nineteen years; that in 1837 he occupied a house and lands in the parish of Llanfihangel Rhydithon for five years; that he paid no rent, but that he paid all levies and taxes for the same; that in the course of such five years he served the office of overseer of the poor of the parish, and that during that year he paid from 12*l*. to 15*l*.

Where magistrates have taken the examination of a pauper brought before them with a view to an order of removal being made, but have refused to make such order, on the ground of the examination disclosing a settlement in the applicant parish, the Court will not, on a suggestion that the refusal is founded upon erroneous grounds, grant a writ of mandamus to the justices, to compel them to make such order.

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for parochial rates. This examination having been taken, the magistrates expressed a desire to postpone the consideration of the case, and no objection being offered, it was accordingly adjourned until the next petty sessions, which were to be held on the 1st of December following. On that day the overseer of the applicant parish again appeared before the justices, but Mr. R. Price, and the Rev. J. Price then informed him that they and their brother magistrates had determined not to make any order for the removal of the pauper and his family, for that having considered the examination, they were of opinion that there was disclosed upon the face of it a settlement in the parish of Llanfihangel Rhydithon, by payment of parochial rates, and by serving the office of overseer, subsequent in date to that which was shewn to have been gained in the parish of Blethvaugh. Upon a subsequent day, the application was renewed by the attorney of the parish, but without success, the magistrates declining to review their decision. It was now submitted that a settlement in the parish of Blethvaugh was clearly disclosed in the examination, and that there was nothing stated therein which shewed any settlement in the applicant parish. In order to establish a settlement since the 4 & 5 Wm. 4, c. 76, s. 66, by renting a tenement, there must be not only an occupation, but a payment of rent to the amount of 10s

(amended by the 35 Geo. 3, c. 101, s. 1) enjoined justices of the division in which any poor person should become chargeable, to remove such poor person to his place of settlement; and it was urged, that as the law was silent as to any specific remedy to enforce the rights of parishes in the position of that of Llanfihangel Rhydithon, the Court would grant a writ of mandamus. If the Court should refuse the writ, that parish would be without a remedy, while on the other hand, to grant it would be to enable the two parishes to try and settle their rights, for it would be competent to the parish of Blethvaugh to appeal to the sessions. Further, it was submitted that the magistrates were required to perform a duty of a ministerial nature only, and not of a judicial character; and there was no reason why they should take upon themselves to refuse to make this order. *Rex v. Martyr and Fulham (a)*, and *Rex v. Benn (b)*, were in point.

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WILLIAMS, J.—I am of opinion that the Court cannot interpose in this case, in the manner which is suggested. I do not agree in the proposition which has been advanced, that the act which the justices are called upon to perform is of a ministerial nature, for how can I call that a ministerial act, wherein persons are called upon to form a judgment upon the evidence brought before them. A writ of mandamus is generally granted by this Court, where justices neglect or altogether refuse to enter upon the discharge of their duties; and if this had been the case of any two justices, or of any one justice of the peace peremptorily refusing to hear the examination of the pauper, the question would be of an entirely different nature. But there was an examination taken; and the greater part of the observations of the learned counsel in support of this application, proceed upon the erroneous construction which the justices are said to have put upon

(a) 13 East, 55.

(b) 6 T. R. 198.

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this examination, namely, that the settlement in the parish of Blethvaugh amounts to nothing at all; and that that settlement was superseded by another subsequently gained in the parish of Llanfihangel Rhydithon. Into that judgment I cannot enter; for it appears to me that this is precisely a case in which the justices have entered upon their duty; and having done so, I cannot undertake to say that I should send back the case by mandamus, in order to bind them to a re-hearing. The result might be the same, for the mandamus would only require them to enter upon the inquiry. If I am not mistaken, the Court has said, that if justices refuse to make a poor-rate, they will direct them to do so, if there was no ground for their refusal; but they declined to direct them, by mandamus, to make an equal rate, because it was to be presumed that if they began their duty, they would perform it correctly (a).

Rule refused.

(a) *Rex v. Barnstaple*, 1 Barnard. 137; 1 Bott. 118.

Ex parte BUCKLE.



an attorney of this Court, without producing or filing the said assignment with the Judge's clerk, on granting such fiat. The object of this application was, that Mr. Buckle might be admitted an attorney at the end of the present Term. Mr. Buckle had served the original articles of clerkship, down to the 1st of August, 1840, but he was then assigned, and a due assignment executed to Mr. Aldridge, an attorney of this Court. Mr. Buckle having completed the requisite period of service, had caused the proper notices to be given, with a view to his admission this Term, and he had lodged with the examiners all the necessary documents, excepting the original deed of assignment of his articles to Mr. Aldridge, and this he was prevented from lodging, by reason of his having annexed the same to the affidavit of such assignment, and of his having filed the affidavit with the officer of this Court, with such original assignment annexed. The examiners, it was sworn, were willing to proceed to the examination of Mr. Buckle, upon the terms prayed by the rule, with the sanction of the Court.

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WILLIAMS, J.—I see no objection to a rule being granted in the terms prayed.

Rule granted.

TEBBUTT v. AMBLER.

THIS was a rule, calling upon the plaintiff to shew cause why an attachment should not issue against him for a con-

Although
where a de-
mand of money
payable under

an award is made by a stranger, not a party to the arbitration, it must be made under the authority of a power of attorney, given by the party to whom the money is to be paid; the same rule does not apply where a demand of the execution of deeds under an award is to be made: therefore, where an arbitrator, by his award, directed the plaintiff to execute certain deeds of release and assignment, and the demand of such execution was made by an agent to the defendant's attorney, but the plaintiff refused to comply with the award; the Court held, that he was liable to an attachment for such non-compliance.

It is no objection, in answer to a motion for an attachment for disobedience to an award, which directs the execution of certain deeds, that it was the duty of the arbitrator to have prepared such deeds.

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tempt of this Court, in omitting to execute three several deeds of release, assignment, and mortgage, described, pursuant to an award. From the affidavits on which the rule had been obtained, it appeared that an action having been brought by the plaintiff against the defendant, in this Court, the suit, as well as certain disputes, which were the subject of proceedings in Chancery, was referred to the arbitration and award of a member of the Bar. The award found that under and by virtue of a certain specified agreement, the defendant was entitled to a good and valid assignment of certain leasehold premises, and also to a good and sufficient mortgage on certain freehold property; it then directed the execution of deeds of assignment and mortgage; and further ordered, that the plaintiff should, at the request and the cost of the defendant, execute a release of all his right, title, and interest, in and to certain other premises: the premises being all respectively described. From the affidavits, it appeared, that Mr. Lake, the attorney for the defendant, having caused three several deeds of assignment, mortgage, and release, to be prepared, on the 4th of May, 1842, he sent drafts thereof to the plaintiff for his perusal; on the 18th of May, he gave notice to the plaintiff, that unless they were returned by the 26th, he should consider that he agreed to their terms; the plaintiff, thereupon, returned the draft deeds of assignment and re-

Humfrey now shewed cause. First, no sufficient authority on the part of Mr. Matthews, by whom the demand of execution had been made, was shewn. The rule was laid down in *Tidd's Prac.* p. 837, ed. 9, that where a demand was made of the execution of an award, by a person not the party in the cause, in whose favour the award was, he must not only be authorized by a power of attorney to make such demand, but he must also give an assurance to the party called upon, of his authority, by the production of such power, and *Laugher v. Laugher* (a) bore out this view of the practice. [*Patteson*, J.—That is so with respect to a demand of money; does the same practice prevail in such a case as this?] No distinction could be drawn, in principle, between the present case, and the case of a demand of money, and the same practice must apply to both. Here it was not even the attorney of the party who made the demand, but his agent only. But, secondly, this was not a case in which it was reasonable to come to the Court for an attachment. In answer to the affidavits on which the rule had been obtained, it was now sworn, that the mortgage deed, the draft of which the plaintiff had detained in his possession, was objected to by him altogether, and that with regard to that, as well as the other deeds, the plaintiff had referred Mr. Mathews and Mr. Lake to Mr. Berry, his attorney. The defendant must also be unsuccessful in this application, because this was an attempt to put the penal process of the Court into operation, and if the Court saw that too much was asked, it would hold that he was disentitled to succeed at all. In respect of the mortgage deed, at all events, the defendant could have no attachment; he had not shewn that he was prepared to call upon the plaintiff to execute this instrument, but, on the contrary, it appeared, that the draft of it, which was disapproved of, and which was altogether objected to, was still in the plaintiff's own possession. Thirdly, the questions

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(a) 1 Tyrw. 352; S. C. *Ante*, vol. 1, p. 284, O. S.

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upon the form or effect of the deeds to be executed, should not have been left to be the subject matter of dispute between the parties, but it was the duty of the arbitrator to have settled in what terms they should be drawn and executed. *Glover v. Barrie (a)*.

The *Solicitor General* and *Hoggins*, in support of the rule. The rule contended for by the plaintiff, that a party demanding the execution of an award, must be authorized by power of attorney, found an exception in an instance like the present, where money was not sought to be obtained, but the execution of instruments. *Chitt. Arch.* 1257, *Kenyon v. Wason (b)*. Secondly, it did not lie in the mouth of the plaintiff to object to this application on any ground of want of courtesy on the part of the defendant. By the letter of Mr. Lake of the 18th of May, he was fully apprised of the steps which were proposed to be taken, and of the intention of the defendant to proceed to the obtaining of that to which he was entitled under the award. Nor could the plaintiff take any advantage of his own detention of the draft mortgage deed sent for his approval by the defendant; because, after the letter already referred to, the defendant had a right to suppose that that deed was not objected to. With regard to Mr. Lake being referred to Mr. Berry, as the attorney of the plaintiff; no effect

ticular, was sufficient to entitle the defendant to come to the Court with this application. With respect to the third point, the defendant was quite willing that the case should go back to the arbitrators to settle the deeds.

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Cur. adv. vult.

PATTESON, J.—This was a rule for an attachment against the plaintiff, for not executing certain deeds pursuant to an award. In answer, it is said, first, that the person who tendered the deeds for execution, had no power of attorney authorizing him to make the demand. The case of *Kenyon v. Wason* (a) is a direct decision that a power of attorney is not necessary in such a case, although it is where money is demanded, or anything for which a discharge is to be given, and the case of *Lodge v. Posthouse* (b) is to the same effect. This objection, therefore, cannot, I think, prevail. Secondly, it is said, that the arbitrator should have drawn the deeds himself, but this is not necessary, in my opinion. He has directed that the plaintiff should execute three deeds,—a release of his interest in certain premises, an assignment of a term, and a mortgage. It would be very convenient indeed to refer the matter back to the arbitrator to settle the deeds, and the defendant offered to do this upon the argument, but the plaintiff refused. I threw it out early in the discussion, that this would be desirable, and even now strongly recommend that course. Thirdly, it is said, that the plaintiff never did refuse, but I think the affidavits shew that he did. He referred indeed to an attorney of the name of Berry, but that person had never been concerned in the matter, and the plaintiff is himself an attorney, and acted for himself throughout; I consider the reference a mere evasion. Fourthly, it is said, that the deeds were not properly drawn. Now, drafts were sent of all three. The assignment was returned with some alterations made by the

(a) 2 Smith's Rep. 61.

(b) Loft, 388.

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plaintiff, which the defendant adopted, and they are introduced into the deed tendered for execution. The mortgage draft never was returned by the plaintiff, but neither did he state any objection to it, and I think that after the time that elapsed, the defendant might reasonably consider that it was not objected to. The draft of the release was returned with no alteration, excepting an underlease made by the plaintiff for eighty-seven years. I am quite clear that he had no right to make this exception. He was ordered to release all his interest; if the under-lease be a binding one, it will stand good against the defendant, notwithstanding the release of all the *plaintiff's* interests; if it be not a binding one, the defendant cannot be called upon to recognise it. This is so plain, that I cannot but consider the plaintiff's whole conduct as a mere attempt to evade the performance of the award, and I am of opinion, that the rule must be made absolute, but that the attachment should lie in the office for a month, to give the plaintiff time to execute the deeds, or arrange the matter with the defendant.

Rule accordingly.

Ex parte RUDGE.



and who had, during that time, occupied himself as an officer of Customs. It was submitted, however, that in the capacity of collector of rents, and agent, it might be reasonably presumed that the applicant would have had frequent occasion to adopt proceedings at law, in doing which, he would have opportunities of maintaining his acquaintance with the principles and practice of his profession. At all events, his case might fairly be deemed to be distinguishable from that of a Custom-house officer, whose opportunities of observing the progress of the changes in the law, must be very small (*a*).

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WILLIAMS, J.—I do not think that any distinction arises in this case, which can be relied on. I am not prepared to say, that a man engaged in collecting Customs duties, may not refresh his knowledge of law, as well as a collector of rents. The principle which I find to have been acted upon is, that a long desuetude has resulted in a want of knowledge. The same observation, I think, applies in this case.

Application refused.

(*a*) In the case cited, the application appears to have been rejected solely on the ground of the length of time which had elapsed, since the applicant had practised.

HARVEY v. HOFFMAN.

ERLE moved for a rule, calling upon the defendant to shew cause why there should not be a new trial of this action, and why he should not pay the costs of the former trial. It was an action of assumpsit for work and labour done by the plaintiff for the defendant at his request; the

Where to a plea of set-off, the plaintiff replies, "that he was not at the time of the commencement of the suit, nor is indebted to the

defendant, in manner and form, &c.," he is entitled to give evidence of payment in answer to the proof in support of the plea.

Such evidence, however, would not be admissible under a replication of *nunquam indebitatus* to a plea of set-off.

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defendant pleaded a set-off arising upon his bill as attorney for the plaintiff; replication, that the plaintiff was not, nor is indebted in manner and form as in the plea alleged. At the trial before the under-sheriff of Middlesex, the defendant began, and having proved a demand exceeding that in the declaration, the plaintiff proposed to call witnesses to prove that the defendant's bill of costs had been paid. To this the defendant objected, and, in support of his objection, he cited *Jackson v. Robinson (a)*, the marginal note of which as printed in the book which he produced, was as follows: "Where a plaintiff replies to a plea of set-off that he was not, nor is indebted to the defendant in manner and form, &c., he is not at liberty to give evidence of payment, in answer to the proof in support of the set-off." This authority was admitted by the under-sheriff, and a verdict was returned for the defendant. The present motion was made upon affidavit, that since the original publication of the number of the Reports, which contained the case of *Jackson v. Robinson*, a cancel leaf had been distributed to the subscribers to those Reports, in which some alterations were made in the statement of the decision of that case, the effect of which was to shew that the marginal note, as cited, was incorrect, and that the decision was the reverse of that which was stated, and that under the circumstances disclosed, payment might be given in evidence. It was

to the Reports, and that he had borrowed the particular book which he had produced at the trial, from a law-book-seller. With regard to the case of *Jackson v. Robinson*, it was urged that it bore internal evidence that the original report was correct. There *Brown v. Daubeny* (a), was referred to, and the marginal note of that case was, "If the plaintiff replies nunquam indebitatus to a plea of set-off, and the defendant proves his plea, the plaintiff will not be at liberty under his replication, to shew that the sum proved, or even any part has been paid." This case was treated as an authority, and fully warranted the decision in the particular case that the evidence was inadmissible. Upon general principle, it was submitted that the evidence could not be received.

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Erle, contra. *Brown v. Daubeny* was no authority for the defendant in this case; because the decision there proceeded directly upon the point that the issue raised was upon the replication of nunquam indebitatus, and that if the plaintiff ever had been indebted, the issue must be found against him. In *Jackson v. Robinson*, the decision was obviously that which was stated in the amended report; for the rule was made absolute, and this was a result which was quite inconsistent with the argument here raised for the defendant. It was, besides, a familiar practice, that where the issue was in the terms here employed, the plaintiff was entitled to give evidence of payment. It was admitted that the defendant had answered that part of the rule which charged him with misconduct, and that the case, therefore, rested merely upon the misdirection of the under-sheriff.

Cur. adv. vult.

WILLIAMS, J.—This was a motion for a new trial, in

(a) *Ante*, vol. 4, p. 585, O. S.

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consequence of the misdirection of the under-sheriff. The declaration was for goods sold and delivered, to which there was a plea of set-off, and the replication was in this form, "that the plaintiff was not at the time of the commencement of this suit, nor is he indebted to the defendant in manner and form as in the plea alleged." Thereupon, evidence of payment proposed to be given on behalf of the defendant was rejected. A great deal was said as to a case of *Jackson v. Robinson*, as it is reported in 8th *Dowling's Practice Cases*, p. 622, wherein there was a rule made absolute for a new trial upon the rejection of identically the same evidence. There has been an alteration made in the report of that case, but the report, from the facts which appear on the face of it, speaks for itself, because there, upon an issue on a replication to a plea of set-off, "that the plaintiff was not, nor is, indebted modo et forma," as here, a discussion took place, and finally, my Brother *Coleridge* made the rule absolute for a new trial in consequence of the rejection of such evidence. It is plain, therefore, that the state of facts must have been that which appears upon the amended report. But in 4th *Dowling*, p. 585, a case of *Brown v. Daubeny* arose, wherein the issue tendered to a plea of set-off was never indebted, and there, my Brother *Patteson* was of opinion that on an issue so framed, payment was not admissible. If therefore a

in the replications in the two cases, was mistaken in holding that this evidence should be rejected, and this rule must be made absolute for a new trial.

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Rule absolute, without costs.

LEVI v. COHEN.

J. W. SMITH moved for judgment on an old warrant of attorney. The affidavit stated that the deponent had seen the defendant alive on the 28th of October, 1842; and that he had been informed by an acquaintance of the defendant, that he was seen alive within the last few weeks, and he believed the same to be true. It was submitted that this affidavit complied with the requisites of the rule as laid down in 2 *Chitt. Arch.*, p. 695, and in the case of *Reeder v. Whip* (a). [*Williams, J.*—A whole term has intervened since the deponent saw the defendant.] In *Watts v. Bury* (b), five weeks had elapsed since the defendant had been seen alive. The Rule of H. T., 4 Wm. 4, s. 3 (c), which directed, that "all judgments shall be entered of record of the month and year, whether in Term or Vacation when signed and shall not have relation to any other day," obviated the difficulty which might present itself of a judgment being obtained after the death of a party.

A motion in H. T., for judgment on an old warrant of attorney, upon an affidavit, stating that the defendant had been seen alive on the 28th of October, and that an acquaintance of the defendant had informed the deponent that the defendant had been seen alive within a few weeks, and which was believed to be true, was rejected on the ground of the insufficiency of the affidavit.

WILLIAMS, J.—Without attempting to draw any precise line, I think that the period which has elapsed since the defendant was seen, is too long for me to grant this rule.

Rule refused.

(a) *Ante*, vol. 5, p. 576, O. S.

(c) *Ante*, vol. 2, p. 312, O. S.

(b) *Ante*, vol. 4, p. 44, O. S.

1843.

PHILLIPS v. SMITH.

A plea of nul tiel record to a declaration, in scire facias, on a judgment, more than a year and a day old, puts in issue only the recovery of the judgment; therefore, where upon a motion for judgment on such a plea, it appeared that the venue in the proceedings in scire facias was in Kent, but in the original action in London, it was held, that the variance was immaterial.

W. H. WATSON moved for judgment upon a plea of nul tiel record, pleaded by the defendant, to a declaration in scire facias, upon a judgment more than a year and a day old.

Mazzinghi shewed cause in the first instance. He contended that the plaintiff was not entitled to judgment, because in the original action in which the judgment was recovered, the venue was in London, whereas in the proceedings in scire facias, the venue was laid in Kent, and this was a substantial and material variance. It was laid down (*a*), that a sci. fa., founded upon a judgment, must be directed to the sheriff of the county in which the venue was laid, the defendant being supposed to reside in that county. According to the old practice, the whole record was set out in the declaration in sci. fa.; by the modern practice, it was usual to state the recuperavit in general terms. But all the requisites which accompanied the use of the ancient mode of proceeding, must be taken to attach themselves to the more recently adopted practice. A variance in the venue, would formerly have been a sufficient answer to such an

The plea of nul tiel record alleged, "that there is not any record of the said supposed recovery in the declaration mentioned, remaining in the said Court of our lady the Queen in manner and form, &c."

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WILLIAMS, J.—It seems to me, undoubtedly, that if the questions of venue were incorporated throughout the proceedings, and had been put in dispute between the parties, this would have been a good answer to this motion. But upon the pleadings, the judgment alone is in issue. The issue is simply whether or not there is a record of the judgment which was recovered remaining in this Court. That does not incorporate the question where the venue was in the original suit. The question is, whether by the judgment of the Court, there was a certain sum of money recovered? That is established in law by the production of the record. If I am wrong, there is a remedy elsewhere, by which advantage may be taken of my error.

Rule absolute.

Doe dem. FISHMONGERS' COMPANY v. ROE.

BOVILL moved for judgment against the casual ejector. The affidavit on which he moved, stated, that the premises in question, in the cause, were in the occupation of the "South London Institution;" that service had been effected upon the matron of the Institution, on the premises, and on the secretary; and that the solicitor of the Association had, since the service, acknowledged that the declaration and notice had come to his hands.

WILLIAMS, J.—You may take a rule. I know not what else you could have done.

Rule granted.

upon the secretary, and a subsequent acknowledgment by the solicitor to the association of the declaration, and notice having reached his hands.

Where the premises in question in an action of ejectment were in possession of a charitable association as tenants, the Court granted a rule for judgment against the casual ejector, upon affidavit, disclosing service upon the matron of the institution on the premises, and

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MUGGERIDGE v. WARD.

An affidavit in support of a motion to set aside a writ of distringas on the ground of the insufficiency of the statement of the attempts to serve the defendant with the writ of summons, in the affidavit on which that writ was granted, must deny that the copy of the writ of summons reached defendant's hands.

PEARSON moved for a rule, calling upon the plaintiff to shew cause why the writ of distringas issued in this action, to compel an appearance, should not be set aside. The affidavit on which the writ had been granted, disclosed a service of the writ of summons on a female at the house of the defendant, but did not state who she was, or what authority she had to receive or reject service of any legal process on behalf of the defendant. This it was urged was a defect in the affidavit, which was fatal. [*Williams, J.*—Does the defendant deny that the writ reached his hands?] No.

WILLIAMS, J.—Then I will not interfere upon that affidavit.

Rule refused.

Doe dem. RAMSBOTTOM and Others v. ROE.

A sci. fa. issues to revive a judgment in execution.

LOWNDES moved on behalf of the lessors of the plaintiff, for leave to sign judgment upon a writ of scire

on the 4th of January, 1843, on Hutchinson, of the writ of scire facias having been issued and lodged at the office of the under sheriff, but Hutchinson was therein described as "the tenant in possession of part of the premises in the declaration of ejectment in this cause mentioned." The sheriff's return to the writ was nihil. The object of the present motion was to obtain judgment for non-appearance so far as related to such part of the premises as was in the possession of Hutchinson. It was submitted that it was clear that a scire facias was requisite to revive a judgment in a real action, after the lapse of a year and a day from its being signed; "for the judgment being particular in the real action quoad the lands, with a certain description, the law requires that the execution of such judgment shall be entered on the roll, that it may be seen whether execution was delivered of the same thing of which judgment was given. If, therefore, no execution appeared on the roll, a scire facias issued, to shew cause why execution should not issue." *Runnington on Ejectment*, 2nd. Ed. p. 478. In *Withers v. Harris* (a), it was said that, "as to the possession, ejectment is a real action." It was besides clearly laid down in *Chitt. Arch.* p. 769, and *Tidd's Pract.* 1249, that a sci. fa. issues in ejectment, as in other actions: and from *Proctor v. Johnson* (b), it appeared that this practice prevailed, although the merits of the case were not denied, and judgment was obtained against the casual ejector. In *Chitt. Arch.* 769, it was said, that where the judgment was against the casual ejector, the terre-tenant must be joined in the writ. Here the terre-tenant of part of the premises only had been served; but it was sought to obtain judgment only as to such part as were in his possession.

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WIGHTMAN, J.—There appears to be no doubt that the lessors of the plaintiff are entitled to judgment against the casual ejector, and also as against the terre-tenant, pro-

(a) 3 Salk. 319; 2 Ld. Raym. 806, S. C.

(b) 1 Ld. Raym. 669.

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vided the latter is properly described in the writ of sci. fa., and has had a proper notice. In one of the affidavits, he seems to be described as "the tenant in possession of the premises," but the affidavit of service of the notice of the writ of sci. fa. describes him only as tenant in possession of part of the premises. From this, it seems probable, that in the sci. fa. he may be described as being in possession of the whole of the premises, and as the judgment must follow the writ, if this motion were granted, judgment would be entered as to the whole; but there is no case to shew that a judgment for the whole may be taken, where the necessary steps to entitle the plaintiff to judgment have been taken in respect of part only of the premises. I have not the sci. fa. before me to see how this is. Let this point be ascertained, and the motion renewed.

Rule refused (a).

(a) Upon reference to the writ of sci. fa., it appeared, that it did not describe Hutchinson as tenant of the whole of the premises; the motion was, therefore, not renewed.

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were persons of eminence, recommended that he should take a sea voyage of some duration, with a view to the eradication of the threatened disease; that on the 20th of that month, the applicant embarked on board a sailing vessel then about to proceed to the United States of America, and that on the 14th of September he arrived at Newbury, Massachusetts; that on the 23rd of December, in the same year, he entered Haward University, and that he remained a student in that establishment down to the 10th of July, 1841, attending the lectures and otherwise following the course of study laid down by Mr. Justice *Story* and Mr. *Simon Greenleaf*, the Dane professors of law of the university: that on the 10th of July, he proceeded to New York, and embarked for England; that he reached Liverpool on the 28th of August, and that he immediately proceeded to the house of his father, at Bristol, where he at once resumed the discharge of his duties as articled clerk; that he continued in this situation down to the 3rd of November, 1842, when he was transferred to the office of Messrs. Adlington and Co., the town agents of his father, with whom he served the remainder of his time. The applicant further stated that the professors at Haward University had given him a certificate testifying his good conduct, and his diligence in the pursuit of knowledge of the law, during his stay at that college, and that during the whole time he was away, he had devoted as much time to the study of his profession as his state permitted, having taken many law books with him. It was submitted, that under these circumstances, the applicant, if he should be found capable of passing the examination prescribed by the Courts, would be entitled to his admission. In *Ex parte Matthews (a)*, an articled clerk, who had served under the articles two years and a-half, when he was prevented by illness from giving regular attention to business during the rest of the term, but attended as his health permitted,

(a) 1 B. & Ad. 160.

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was allowed by the Court to be admitted: and in *Ex parte Hodge (a)*, where the clerk had resided abroad, by the advice of his physician, during an entire year out of the five.

WILLIAMS, J.—I think that the application may be granted.

Rule granted.

(a) M. T. 1838; 2 Jurist, 989.

Doe dem. STARLING and Others v. HILLEN.

A declaration in ejectment, contained three demises; at the trial of the action, a general verdict was taken, subject to a reference of the cause, and all matters in difference, the costs of the cause to abide the event; the arbitrator having directed the general verdict to

THIS was a rule, calling on the lessors of the plaintiff to shew cause why an award, made between the parties, should not be set aside. The affidavits stated that the cause came on for trial before *Tindal*, C. J., at the Spring Assizes, 1842, for the county of Norfolk, when, by consent, a verdict was taken for the plaintiff for 1*s.* damages and 40*s.* costs, subject to the award of an arbitrator, who was to be at liberty to award and direct for whom and for what sum the verdict should be finally entered; that by the order of nisi prius then made, the cause, and also a suit depending in the Court of Chancery, entitled *Hillen v.*

award and determine that the said John Tompson Hillen, the plaintiff in that suit, did not contract, &c., as alleged in his bill in the said suit, and that the said J. T. Hillen is not entitled to the relief prayed by his said bill. And I do award and order, that the said suit in Chancery be no further prosecuted, and that the said J. T. Hillen do forthwith cause his said bill therein to be dismissed. And I do futher award, find, and determine that the said William Starling, the party to this reference, under and by virtue of the last will of his said father, William Starling, deceased, bearing date on or about the 4th day of December, 1840, is absolutely entitled for his own use and benefit to the said farm, dwelling-house, cottage, and hereditaments described or mentioned in the said bill, and to all other, the hereditaments (if any) which the said William Starling, the father, was possessed of or entitled to, for any devisable estate or interest at the time of his decease, as to freehold parts thereof, in fee simple, and as to copyhold parts thereof, for an estate of inheritance to him and his heirs according to the custom of the several manors of which the same are holden, and which premises, with the exception of the said dwelling-house and cottage formed the subject of the said action of ejectment, but subject as to all the said premises to a mortgage debt now vested in Robert Leamon, one of the lessors of the plaintiff in the said ejectment, and as to the freehold parts thereof, subject to the residue of a term of 500 years for securing the same debt." The award then proceeded to define the estate to which William Starling, the lessor of the plaintiff in the ejectment, was entitled, and to give directions for the execution of the award; the arbitrator directed that Starling and Hillen should each of them pay his own costs of the reference, and each of them one moiety of the costs of arbitration and the award, and that on the payment of Starling's costs in the action of ejectment, and in the suit in Chancery by Hillen, and upon the due execution of the award by the latter, mutual releases should be given.

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From the affidavits, it also appeared that the present action was brought upon the several demises of William Starling, Robert Leamon, and Henry Stokes.

The present rule had been obtained upon the following grounds: first, that the declaration containing three several demises, the award ought to have directed upon which of them the verdict was to be entered for the lessor of the plaintiff. Secondly, that the arbitrator having found that the estate sought to be recovered was part of freehold and part of copyhold tenure, and that Wm. Starling, one of the lessors of the plaintiff, was seised in fee of the freehold part, subject to a subsisting term of 500 years, and of the copyhold part in fee, according to the custom of the manor of which the same was holden, ought to have distinguished the freehold from the copyhold part of the estate, and ought to have found if the term of 500 years were vested in either of the other two lessors of the plaintiff. Thirdly, that the arbitrator had left certain matters of account, which were in difference, undecided; and, fourthly, that the arbitrator had exceeded his authority in directing mutual releases to be given (*a*).

Byles (in Michaelmas Term) shewed cause. As to the first objection, that the arbitrator had not found upon which of the three demises, laid in the declaration, the

satisfaction of the plaintiff, and that he did not perform the work with the best materials. The defendant pleaded, first, not guilty; secondly, that the defendant did the works to the satisfaction of the plaintiff; thirdly, that before the breach, the contract was rescinded; fourthly, leave and license; fifthly, that the defendant deviated from the drawings by the direction of the plaintiff's architect; sixthly, a plea stating an agreement between the plaintiff and defendant to build a stone wall instead of the wall mentioned in the original agreement; 7thly, that the defendant, by command of the plaintiff, erected a stone wall instead of a brick wall. The plaintiff took issue on the first two pleas, traversed the third, sixth, and seventh, replied *de injuriâ* to the fourth, and demurred to the fifth; the cause was referred, the costs of the cause and the reference to abide the event; and the arbitrator awarded a general verdict for the defendant, and the award was held not uncertain, inconsistent, or repugnant. So here, if there was nothing inconsistent in the finding, the award must be held to be good; and it was submitted, that the issue in ejectment being not guilty, it would have been inconsistent for the arbitrator to have awarded that the defendant was guilty of the ejectment of John Doe, on the demise of Starling, and not guilty of the same ejectment of John Doe upon the demise of the other two lessors. The case of *Doe dem. Madkins v. Horner and Roupell* (a), would be relied on in support of this rule. There, ejectment being brought on two demises, all matters in difference in the cause, were referred by a Judge's order, which directed that the costs of the suit and of the reference and award, should abide the event of the award; that the party in whose favour the award should be made, might sign judgment as if the cause had been tried at nisi prius; and that if it was in the plaintiff's favour, he might issue a writ of possession thereon, and proceed in the usual way for costs on such judgment. The arbitrator

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awarded that the plaintiff was entitled to the possession "of a certain part of the lands sought to be recovered," which he set out by boundaries; but stated nothing as to the residue, and did not say on which demise the plaintiff was entitled, and gave no damages; and it was held, that the award was bad, for not stating on which demise the plaintiff was entitled. That case was, however, distinguishable from the present, because there no verdict was entered before the reference, nor was a verdict ordered by the arbitrator to be so entered; here, however, there was a general verdict already entered on the record, which the arbitrator directed should remain. The real question amounted to this, whether, under the circumstances, it was impossible, that a general verdict for the plaintiff should stand? Upon the second objection, that the arbitrator had not set out the boundaries between the freehold and copyhold estates, it was argued that as he had found that the whole of the estates belonged to Starling, and as the question of boundary had not been raised, it was unnecessary for him to go into it. It was unnecessary for the arbitrator to decide in whom the term mentioned was vested, for he found that the only person beneficially interested, was Starling. (The arguments on the other objections became immaterial).

Littledale, J., in his judgment, said, "I think also, that the arbitrator ought to have said on which of the two demises," the plaintiff was entitled to recover. It is, indeed, possible that part of the land which is awarded to the plaintiff might be recoverable under one demise, and part under the other. Still the arbitrator should state how the right is. I own that it is not usual to take a verdict so; but a verdict may find that as to one hundred acres, the plaintiff is entitled on the demise of A., and as to another one hundred acres on the demise of B. It may make a difference in the taxation of costs. A verdict might be set right in this respect by the Judge's notes; here, there is nothing on which to proceed." *Patteson*, J., said, "But the award does not say on which demise the event is in favour of the plaintiff; it can hardly be so on both. It may be that some of this part is recoverable under one demise, some under another. But if so, that should be said; if the plaintiff recovers on one demise, the defendants are entitled to costs on the other." *Coleridge*, J., said, "The arbitrator does not say on which demise the plaintiff is to recover. That is, in substance, he does not say which party is to recover the land. The award is, therefore, uncertain." *Doe dem. Errington v. Errington (a)*, and *England v. Davison (b)*, were also referred to. The second objection did not rest on the question whether the arbitrator was requested to distinguish the freehold from the copyhold estates; or whether their limits were discussed. But it was necessary that their bounds should be ascertained, in order that the award might receive its proper effect, and in order that the sheriff might duly execute the writ of possession.

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Cur. adv. vult.

WIGHTMAN, J., in Hilary Term, 1843, delivered Judgment).—This was an application to set aside an award

(a) *Ante*, vol. 4, p. 602, O. S. (b) *Ante*, vol. 9, p. 1052, O. S.

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made under an order of reference at nisi prius, by which the cause, and a suit in Chancery, and all matters in difference between all the parties were referred to an arbitrator, who was, amongst other things, to determine for whom the verdict in the ejectment cause should be finally entered. The declaration contained three several demises, and a nominal verdict had been taken at nisi prius for the plaintiff *generally*, with one shilling damages, and without specifying upon which demise. By the order of reference, the costs of the action of ejectment were to abide the event of it. The arbitrator, by his award, with respect to the action of ejectment, directed "that the verdict already entered for the plaintiff, with one shilling damages, should stand;" but he said nothing as to the several demises, nor did he give any directions respecting them. Several objections were taken to the award, and, amongst others, that it was bad for directing the verdict to be entered for the plaintiff generally, upon a declaration containing three several demises, and that the arbitrator ought to have stated upon which demise or demises the verdict should be entered. It is unnecessary to consider the other objections, as it appears to me that this must prevail. The case of *Doe dem. Madkins v. Horner*, (a) is a decisive authority upon this point. In that case it was held, that where an ejectment cause, upon several demises, was referred to ar-

In the present case, the arbitrator having directed the verdict to be entered generally for the plaintiff, finds that Starling, one of the lessors of the plaintiff, had an estate in fee simple, in parts of the premises sought to be recovered by the ejectment, subject to an outstanding term of five hundred years, to secure an existing mortgage debt, but does not state in whom that term is vested, leaving it quite uncertain whether any of the lessors of the plaintiff had such an interest in part of the premises at least, as would support an ejectment, and shewing that at all events Starling had not, and making no mention of the lessor of the plaintiff, in the third demise at all, or stating any circumstance from which it might be inferred that he had some interest in the premises. As this objection affects the validity of the whole award, the rule for setting it aside must be made absolute.

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Rule absolute.

Ex parte LLEWELLYN.

R. V. RICHARDS moved on behalf of Mr. Llewellyn, for a rule, calling upon the examiners appointed to examine candidates to be admitted attorneys, to proceed to the examination of the applicant, *de bene esse*. The application was founded upon an affidavit made by Mr. Llewellyn, who stated that the examiners had declined to allow him to be examined, upon the suggested insufficiency of his service of articles. Upon the authority of *Ex parte Masterman* (a), however, it was submitted, that the present course was the correct one to be taken; and that at the close of the ex-

Where the examiners have a doubt as to the sufficiency of the service of articles of clerkship by an applicant to be admitted an attorney, and on that ground refuse to examine him, the Court will grant a rule directing his examination, *de bene esse*.

(a) *Ante*, vol. 7, p. 156, O. S.; 6 Scott, 782; S. C. 5 Bing. N. C. 70, reported as the Examiner's case.

Where an applicant, while under articles of

clerkship, discharged the duties of auditor of a Poor Law Union, which, it was sworn, occupied him for a very inconsiderable period of time, and to which he never gave any attention, until after the usual office hours of his master, the Court held that that occupation did not render the service insufficient.

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amination, a certificate might be refused, and the question thus brought before the Court.

WILLIAMS, J., granted a rule.

On a subsequent day, (28th January,)

R. V. Richards moved that Mr. Llewellyn be admitted and sworn an attorney of this Court. The applicant had been examined, and the examiners had granted to him a certificate of his due examination and fitness, but had submitted to the consideration of the Court, the question of the sufficiency of the service of his articles of clerkship by the applicant. From the affidavits, it appeared, that on the 27th of January, 1838, Mr. Llewellyn was duly articulated to Mr. Hulse, an attorney of this Court, who resided at Tunstall, and that he continued to serve him down to the 2nd of December, 1841, when Mr. Hulse died; that on the same day, he entered into fresh articles with Mr. Baker, an attorney, residing at a town, situated sixteen miles from Tunstall, for the service of the remainder of his time; that he conducted the business of Mr. Baker, at Tunstall, and that he had continued under articles to him down to the present period; that although Mr. Baker resided sixteen miles from Tunstall, he was in the frequent habit of visiting his office there, and that he usually remained from two to

ness in the name of Mr. Baker; that on the 21st of June, 1841, Llewellyn applied for, and obtained the situation of auditor of the accounts of the Wolstanton and Burslem Union, and that he received 20*l.* per annum., for the discharge of the duties of that situation; that in the course of his business as such auditor, he was occasionally called upon to attend at the workhouse of the Union, and that the books of accounts were usually carried to his office, to be audited by him. In answer to these allegations, Mr. Llewellyn now swore, that he had received a fixed salary of 100*l.* per annum., from Mr. Baker, and that he had no participation or interest whatever in the profits of his business; he admitted that he had applied for and obtained the situation of auditor to the Wolstanton and Burslem Union, but stated that he did not commence the discharge of the duties of that office until September, 1841; he denied that the books of the Union were generally left for him at the office of his master, but stated that they had been occasionally left for him after office hours; he stated, that he had accepted the office with the permission of Mr. Baker; that his duties occupied him during a very inconsiderable period of time, and that he had invariably abstained from giving them any attention, until after the close of the usual hours of business.

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WILLIAMS, J.—On this state of facts, I see no objection to the admission of the applicant. The duties of auditor seem to have been performed by him merely as extra labour, and if a man chooses to work extra time, and to make two days out of one, I do not see why he should not be at liberty to do so, the damage is to his own constitution, and not to his master.

Fiat.

1843.

REGINA v. ARROWSMITH.

Upon a motion for a criminal information, it appeared that the applicant was an attorney, and an officer of this Court, and the person against whom the application was made, was a magistrate, and that the latter had assaulted the former in revenge, it was suggested, for his having conducted some proceedings against him, on behalf of a client, before justices for a previous assault; the Court refused to interpose its extraordinary protection to the applicant, but left him to his remedy by indictment or

M. D. HILL moved for a rule, calling upon Dr. Arrowsmith, a justice of the peace for the city of Coventry, to shew cause why a criminal information should not be filed against him. The application was made on behalf of Mr. Lee, an attorney of Coventry, and his affidavit stated, that in his professional capacity of attorney, he had conducted the proceedings on behalf of a client, on a charge of assault preferred against Dr. Arrowsmith before the magistrates of Coventry; that he, subsequently, frequently met Dr. Arrowsmith in the streets of Coventry, and that shortly before the present application, being in the news room of that city, he felt himself violently struck across the face with a stick, and on turning, he perceived that his assailant was the person against whom the present application was made. It was submitted, that considering the relative positions of Dr. Arrowsmith and Mr. Lee, the former being a magistrate, and the latter an attorney of this Court, this was a case in which the Court would not hesitate to afford to the latter gentleman its peculiar protection.

WILLIAMS, J.—I think that this case resolves itself into the misconduct of Dr. Arrowsmith, in his ordinary, and not

1843.

FIFE v. BOUSFIELD.

TAPRELL shewed case against a rule obtained by *Erle*, for amending the declaration and issue in this action by changing the venue from London to Surrey. The rule had been obtained upon the application of the plaintiff, and as it was the plaintiff's own fault that he did not lay the venue correctly in the first instance, the Court would not allow this application to succeed, except on reasonable grounds, *Ayres v. Buston (a)*. From the affidavits in support of the present motion, it appeared that this was an action brought to try the right of the defendant, who was the pound-keeper at Stockwell, in Surrey, to take pound-fees on nine head of cattle, one only being impounded as damage feasant; it was stated that all the witnesses resided in the county of Surrey, and it was suggested that the juries of that county understood more on the question of impounding cattle, than those of London. It was now contended, that the expense of trying the action in London, would be much less than that of going to Kingston or Guildford, and that the Court would not be disposed to say that the inhabitants of London were not as competent to try this question as those of Surrey.

Where the cause of action arose in Surrey, and the plaintiff laid his venue in London, the Court refused to change the venue, on the application of the plaintiff, upon a statement that the action was brought to try the right of a pound-keeper to take pound-fees upon certain cattle, and therefore a matter of rural experience; and that all the witnesses resided in the former county.

Erle, in support of the rule. The mere fact of the parties to the action residing in Surrey, would operate upon the Court as a strong inducement to send the cause to be tried in that county, and would be looked upon as affording a reasonable ground for changing the venue. The question in dispute was, besides, a matter peculiarly within the knowledge and experience of persons residing in the country.

WILLIAMS, J.—The distinction drawn by Mr. Taprell is

(a) 6 Taunt. 408.

1843.

FIFE

v.

BOUSFIELD.D.

the right one. The defendant might have had good grounds for asking the court to change the venue, but the plaintiff, who had his option when he brought the action, and had a complete knowledge of all the circumstances connected with it, must shew a reasonable ground for such an application. I think that the application is not a matter of course, but that the plaintiff must lay his grounds for it. The reasons which he gives, however, are very small; it is said that this is a rural matter. But I think that neither this fact nor that of its being a Surrey action, requires me to interfere. It was the duty of the plaintiff to have looked about him, before he took the step of laying the venue, out of the county where the cause of action arose.

Rule discharged.

Doe dem. STURGES v. WARD.

The demand of costs pursuant to the Master's allocatur, cannot be made by a person describing himself as "bailiff" un-

WARREN moved for an attachment against the lessor of the plaintiff for non-payment of costs pursuant to the Master's allocatur. The first question which arose was, whether the first demand which had been made was by a person properly qualified? In his affidavit he described

was made upon the lessor of the plaintiff of the documents necessary to be produced; the affidavit of the defendant's attorney, shewing the second demand, contained no allegations that the original documents in question were again produced, or copies re-served; an interval of two days had taken place between the two acts. It was urged, however, that this was immaterial, and that all the requisites in such cases had been complied with. Supposing the papers to have been handed to the party by a stranger, immediately before the demand was made by the attorney, it would hardly have been said to be insufficient; the lapse of two days, it was urged, could make no difference.

1843.

Doe dem.
STURGES
v.
WARD.

WILLIAMS, J.—The first demand was wrong altogether, as being made by a party who was not authorized; quoad, that demand, your motion is defective. Then you seek to amend the demand by another affidavit, which you say supplies the defect in that which was before made. I think, however, the demand, and the production of the original papers, and the service of the copies should be one act; and that the insufficiency of the second demand is not remedied by what was done on the first occasion.

Rule refused.



REGINA v. The Justices of the West Riding of the County
of YORK.

OVEREND moved for a rule, calling upon the Justices of the West Riding of the County of York, to shew cause why a mandamus should not issue, commanding them to

Where the examination of a pauper, on which it was sought to found a settlement by

apprenticeship, stated, in terms, that the pauper, when about sixteen years of age, "was put out and bound apprentice by the churchwardens and overseers of the poor of W., &c., to W. T., of the township of D.," but contained no further allegation of the residence of the pauper in the township of D. under the apprenticeship; it was held, that although the words "of the township of D.," imported that at the time of the apprenticeship, the master resided at D., yet that the examination did not disclose a settlement, for that there was nothing to shew that the pauper had resided with him there, under his indentures.

1843.

REGINA

vs.
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the West
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YORK.

enter continuances, and hear an appeal against an order of two justices of that Riding, for the removal of a pauper, named James Haley, his wife, and child, from the township of Barnsley to the township of Darton, both in the West Riding. From the affidavits, it appeared that the order was dated the 27th of April, 1842, and that the examination of James Haley, the pauper, on which it was founded, was in the following terms:—

“ I am thirty-six years of age, and was born at Wakefield. When I was sixteen years of age, I was put out and bound parish apprentice by the churchwardens and overseers of the poor at Wakefield, with the consent of two justices of the peace for the said Riding, to William Townsend, of the township of Darton in the said Riding, linen weaver, to serve until I attained the age of twenty-one years. I went to and served and resided with the said William Townsend from the 29th of March, 1822, for above three years and a half, when, as work became scarce, my master proposed to give me my indentures for ten shillings; but as I had not so much money, he gave me my indentures, and kept my box for the ten shillings. After I was twenty-one years of age, I went to my master and paid him the ten shillings, and took away my box. After my indentures were delivered to me, I went to work at Mr. Holdsworth's dye-house, where I remained about

have one child born in wedlock, namely, Ann, aged eleven months, and I am now poor, and actually chargeable to Barnsley aforesaid; my examination is now taken upon the complaint of the overseers of the poor of Barnsley aforesaid, caused by my so being chargeable to them as aforesaid, without having acquired any legal settlement in Barnsley.

Sworn before us, John Thornley,
 H. Watkins.
 his
 James + Haley."
 mark.

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v.
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YORK.

Due service having been effected of a counterpart of the order and a copy of the examination on the churchwardens and overseers of the township of Darton; on the 18th of June, 1842, the overseers of the township of Barnsley received notice, and a statement of grounds of appeal. The third ground of appeal, which alone was material for the purposes of the present application, was, "That the examination of the said J. Haley is defective, insufficient, and bad, because it does not state the date of the alleged indenture of apprenticeship, nor that the said J. Haley served and resided with the said Wm. Townsend in the said township of Darton." On the 4th of July, 1842, the appeal came on to be heard at the general quarter sessions of the peace, when the counsel for the respondent parish proposed to offer evidence of the apprenticeship of the pauper, and his residence with his master, under such apprenticeship, in the township of Darton. The appellants, however, objected, that it was incompetent to the respondents to set up a case of apprenticeship, for that the examination did not specifically aver, that the pauper had resided in the township of Darton at the time when he was stated to have served William Townsend as his apprentice. The Court decided that this was a valid objection, and that the examination did not sufficiently allege a residence of the pauper under the apprenticeship, and that, therefore, the

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respondents were precluded from giving such evidence by the provisions of the 4 & 5 Wm. 4, c. 76, s. 81 (a). No evidence was heard on either side, nor was any other objection taken, and, thereupon the appeal was allowed, and the order of removal was quashed. *Overend* now contended, that the statement in the examination was sufficient to entitle the respondents to give evidence of the residence of the pauper under his apprenticeship. He maintained that the principle to be acted upon in such a case, was, that if the examination, on the face of it, disclosed any evidence, however small, to support the order, the respondents were entitled to give further evidence. The case was not one which depended on a want of a sufficient particularity, and, therefore, did not fall within the principle of *Regina v. Middleton in Teesdale* (b), where the time of renting the tenement on which the order was made, was not stated; or *Regina v. Sussex* (c), where the name of the landlord and the time were omitted; or *Regina v. Bridgewater* (d), where the time of service was not stated in an examination setting up a settlement by hiring and service; or *Regina v. Lydeard St. Lawrence*, (e) where the date of the apprenticeship was omitted. But the question to be decided was, whether the examination sufficiently stated the necessary ingredients of a settlement; and in this respect,

an examination and a statement of grounds of appeal by

so also in *Regina v. The Justices of the West Riding* (a), it was held that in the case of a settlement by apprenticeship, there must be a distinct averment of forty days' residence in the statement of the grounds of appeal. But the distinction was, that in the grounds of appeal, there must be a positive averment in terms of all the ingredients of a settlement, whereas in an examination, all that was requisite was, such a general statement containing some evidence of each material fact, as would justify the removing justices in coming to the conclusion that a settlement had been gained, and in making the order of removal. *Regina v. Eastville* (b); *Regina v. West Riding of Yorkshire* (c); *Regina v. Stapleford Fitzpaine* (d), bore no analogy to the present case, because they involved the principle of particularity of statement in the examination with reference to affording information to the opposite party, and had no bearing on the question, whether, in point of law, the examination contained sufficient evidence of the requisite ingredients of a settlement. Then, could it be said, that in this examination, there was a total absence of evidence of the residence of the pauper in the appellant township under his apprenticeship? In a case of *Keighley v. Wilsden* (e), there was evidence of a settlement by acknowledgment; consisting in the fact that relief had been granted to the father of the pauper twenty-four years before, on one occasion, and Lord Denman granted a mandamus to the justices to hear an appeal, on the ground that there was some evidence, although slight. In this examination the material words were those which alleged the apprenticeship of the pauper to W. Townsend, "of the township of Darton." The word "of" so used meant residing in, and it had received such a construction under the Statute of Additions (1 Hen. 5, c. 5). *Stark. Crim. Pl.* 52; *Bac. Ab.* tit. "Abatement," (F. 25). [*Pat-*

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(a) 11 Law Journ. (N. S.) M. C. 80. (d) 11 Law Journ. (N. S.) M. C. 38.

(b) 1 Gale & D. 150.

(c) 10 Ad. & El. 685.

(e) T. T. 1842, Q. B., not reported.

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"
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teson, J.—Supposing your argument to be correct, the word cannot also import that the pauper resided with Townsend long enough to gain a settlement. The pauper may not have served his master in Darton at all]. The Court would not assume that the master kept his apprentice employed at a place distinct from that in which he lived. In civil cases the same construction had been given to the word "of;" *Vin. Ab. tit. "Abatement,"* (B. a. 34); and under the rule of Court of M. T., 15 Car. 2, (by which it was ordered that the name and place of abode of every deponent should appear in his affidavit), it had been construed to mean "place of abode." *Chit. Arch.* p. 1229. In *Regina v. Toke* (a), upon an application under stats. 43 Eliz. c. 2, s. 7, and 59 Geo. 3, c. 12, s. 26, which authorize the making of orders on children having sufficiency to maintain their parents, an order describing a party as T. G. "of" the parish of M., in the county, &c., was held to shew sufficiently that T. G. lived in the county named; and there *Patteson*, J., said, "I have had some doubts on this point; but the word 'of' very generally does import dwelling, and I think it may be taken *primâ facie* to do so here." It must, therefore, be presumed that Darton was the place of residence and of abode of Mr. Townsend; and that the pauper went and lived with him there. This being conceded, the Court would also presume the conti-

PATTESON, J.—I quite agree with Mr. *Overend* as to the effect of the word “of.” It no doubt means residing in, in the common case of an affidavit, when coupled with the name of a place; but yet, giving full scope and effect to Mr. *Overend’s* argument, there is still here this defect, that the examination does not say then residing or being of the township of Darton. In fact, it does not say where the master resided. It is quite consistent with the statement in the examination, that he resided with Townsend elsewhere than in Darton. He may have removed before the pauper went to him. Mr. *Whateley*, in a case this morning, adverted to the mischiefs arising from such a decision; but, I confess, I do not very well see where the mischief is; and here, where the defect in the examination is so palpably hit by the grounds of the appeal, they might have corrected their mistake. They have themselves to blame if they proceeded with the order. It would have been exceedingly easy to quash the order after such a defect as this had been pointed out to them. If parties choose to persist, they must take the consequences. I think the sessions were very right.

1843.
REGINA
v.
The Justices of
the West
Riding of
York.

Rule refused (a).

(a) The above case was de- accidentally omitted in its proper
cided in M. T. 1842, but was place.

Experte HIGGINS, In re REGINA v. STACK.

GREAVES moved that a recognizance of bail returned into this Court from the county of Worcestershire for the purpose of being estreated, should be remitted back to the justices of that county to be amended. It appeared that one Stack having been held to bail for an assault upon

A recogni-
zance of bail
having been
returned into
Court for the
purpose of
being es-
treated, the
Court refused
to remit it
back to the justices in order that it might be amended.

1843.

Ex parte
Higgins.

Higgins, had entered into a recognizance, which he had since forfeited, by committing a fresh breach of the peace. The recognizance was then returned into this Court, but upon examination, it appeared, that in the margin it was dated of the county of Worcester; in the body, it purported to be taken before a magistrate for the county of Worcester, but it further purported to be taken at Ledbury, in the county of Hereford. It was sworn, that the justice before whom it was taken was a magistrate for the two counties of Worcester and Hereford. It was urged that the error was merely clerical, and that as a recognizance was not always drawn up at the time it was taken, even though in this instance it had been returned into Court, it might be amended. In *Regina v. The Justices of St. Albans* (a), it was held that under sect. 6 of the Parochial Assessment Act, (6 & 7 Wm. 4, c. 96,) which enacts, "that the decision of special sessions on appeal against a poor rate, shall be conclusive, unless the party impugning such decision give notice, as therein prescribed, to the opposite party, and within five days afterwards, enter into a recognizance before a justice of the peace to try at the quarter session," it is sufficient that the recognizance be within the five days, verbally acknowledged before a justice, and that the record of the recognizance may be perfected afterwards from the minute then made. [Williams, J.—So also in

the rule prayed. The object is to make the defendant responsible on this recognizance, but having moved it into Court, the prosecutor must stand or fall by it. I cannot allow it to go back to be amended. The defendant may have known that the recognizance was worth nothing when he committed the second breach of the peace.

1843.

Ex parte
HIGGINS.

Rule refused.

REGINA v. BROMHEAD.

INGHAM moved for a certiorari to remove an indictment from the adjourned Quarter Sessions of the West Riding of the county of York, into this Court. The offence charged in the indictment was the exposure for sale, by the defendant, of unwholesome meat, as human food; from an affidavit which was sworn in support of the present motion, it appeared, that the meat had been seized by a constable, and that after the indictment had been preferred and found, an action was commenced by the defendant, in which he complained of a trespass by the constable in the seizure which had taken place; it was also sworn, that it was expected that a point of law would arise upon the trial of the indictment, whether it was an indictable offence for a butcher to expose for sale unwholesome food, without proof that he was cognizant of the fact of its unwholesomeness. In 4 *Inst.* 261, c. 54, it was laid down, that to sell corrupt victual was an offence: and from *Rez v. Pedly* (a), it might be argued that the offence arose, even where the knowledge of the party charged was not proved, provided he derived a profit from the act. The present motion was made at the instance of the prosecution, and it was urged, that it would be to the advantage of all

Where an indictment had been preferred against a person for exposing to sale unwholesome meat, and the meat having been seized, the defendant in the indictment, brought an action for the trespass committed in the seizure, the Court, at the instance of the prosecutor, granted a certiorari to remove the indictment from Quarter Sessions to this Court for trial.

(a) 1 Ad. & El. 822.

1843.
 REGINA
 v.
 BROMHEAD.

parties, that the indictment and the action should be tried before the same tribunal.

WILLIAMS, J.—I confess I do not see the difficulties suggested by the learned counsel as being likely to arise upon the trial of this indictment; nor does it appear, whether the indictment itself raises the question. It is not suggested, that the Court of Quarter Sessions are predisposed to do injustice, nor is it by any means a complete or difficult subject of inquiry. It looks, however, very much as if the object of the action was to stop the indictment; and that being so, as the prosecutor is desirous of removing the indictment, I think that is a sufficient reason.

Rule granted.

HOLMES v. NEWLANDS.

Seemle, that this Court cannot quash a writ of error, though unduly allowed by the officer.

The Court, however, pos-

M*A*R*T*I*N* moved for a rule, calling upon the defendant to shew cause why a writ of error sued out by him in this action, and returnable in the Exchequer Chamber, should not be quashed. The ground of the present motion was that a previous writ of error upon the same judgment had

been sued out and argued in the Court of Ex-

error from the Queen's Bench to the Exchequer Chamber cannot be quashed by this Court: and it seems to be doubtful whether the motion should not be made in Chancery, from whence the writ issued; or to the Court of Exchequer Chamber.

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 HOLMES
 v.
 NEWLANDS.

On a subsequent day,

Martin renewed his application, and obtained a rule to quash the *allowance* of the writ of error, with costs.

Mr. *Newlands*, the defendant, shewed cause. He produced an affidavit sworn by himself, in which he stated that the present writ of error was not brought to reverse the judgment of the Court of Exchequer Chamber, but that it was brought to attack a part of the judgment of this Court, which had not come in question upon the argument which had already been had in the Exchequer Chamber. He objected that this Court had no power to make the present rule absolute, for that in *Jones v. De Lisle* (a), the Court of Common Pleas had said that the officer was bound to allow the writ, and that any motion to avoid such allowance must be made in Chancery. The statute 11 Geo. 4, and 1 Wm. 4, c. 70, s. 8, provided that "the Court of Error, after errors duly assigned and issue in error joined, shall, at such time as the Judges shall appoint, either in Term or Vacation, review the proceedings, and give judgment as they shall be advised thereon; and such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original record remains, from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament." This, however, was only applicable to cases where the same

(a) 3 Bing. 125.

1843.

HOLMES
v.
NEWLANDS.

causes of error were sought to be discussed, and no objection arose to a second writ of error, provided it did not seek to impugn the judgment of the Court of Error upon the specific matter already argued and determined. *Campbell v. French* (a) seemed to shew that several writs of error might be brought upon the same judgment. There, it was held, that if judgment be given for the plaintiff on one count of a declaration, and a distinct judgment for the defendant on another, and the defendant brings a writ of error to reverse the judgment on the first count, the Court of Error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record.

Martin, in support of the rule. The present motion was to induce the Court to disallow an act of its own officer, which had been imprudently done, and the power of the Court so to interpose to correct the mistake of its officer could not be disputed. The statute was positive in its provisions, and clearly shewed that this writ was irregular.

WILLIAMS, J.—As to my power on this occasion to interfere, I have no doubt whatever. It is said that the writ is issued from another place, and that this motion should have been made in the Court of Chancery, for that

record all along remains in the Court of Queen's Bench. Then with regard to this writ of error, it is said, that although it is the second writ of error on the same judgment, still there is a distinction in a case where such writ is brought on a part of the judgment, distinct from that on which the first writ was brought. The act of Parliament, however, makes no such distinction. Then here, I have a case of the allowance of a writ of error by the officer of this Court, after another writ on the same judgment has been disposed of; and referring to the act of Parliament, I find a positive and clear enactment, that a judgment on a review of the proceedings having been given, from that "judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament." What can I say then, except that the allowance of this second writ in direct opposition to the express provisions of the statute was an inadvertent act on the part of the officer, which ought to be set aside. This rule must be made absolute, with costs.

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 HOLMES
 v.
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Rule absolute, with costs.

REGINA v. The Justices of MIDDLESEX.

IN this case, a rule had been obtained, calling upon the Justices of the County of Middlesex to shew cause why a writ of mandamus should not issue, commanding them to

A rule nisi for a mandamus to compel justices to enter continuances, and hear an appeal

against a conviction under the Turnpike Act, having been obtained; it was held, that it was no objection to counsel appearing to shew cause, that they were instructed by the attorney of the trustees of the road, on which the offence was alleged to have been committed by the applicant, and not by the justice before whom, or the informer by whom, the complaint was made, on which the conviction took place, and to whom, respectively, the rule was addressed.

A conviction having taken place under the Turnpike Act, on Monday, the 2nd of May, and notice of appeal served on the following Monday, the 9th of May: *Held*, that it was too late, for that it was not "within six days after the cause of complaint," within the provisions of the 87th section of the 4 Geo. 4, c. 95.

An appeal came on to be heard on the 6th of July, when it was adjourned, by reason of the press of business at Sessions; on the 7th of August, (the next appeal day,) it was again adjourned "by consent of counsel:" *Held*, that the respondents, on a subsequent appeal day, were nevertheless entitled to call for proof of the original notice of appeal, or to object that the notice given was insufficient.

1843.
REGINA
v.
The Justices of
MIDDLESEX.

enter continuances, and hear an appeal at Quarter Sessions, against a conviction of one justice, under the Turnpike Act. From the affidavits, on which the motion had been made, it appeared, that in pursuance of a summons served upon him, the present applicant, on Monday, the 2nd of May, 1842, attended before a magistrate for the county of Middlesex, to answer a complaint, for that he, on the 16th of April, in the parish of Hillingdon, in that county, had passed through a certain authorized toll-gate, in a vehicle drawn by one horse, without paying the toll; that, on that day, the hearing of the summons and complaint took place, and that he was convicted; that on Monday, the 9th of May, a notice of appeal, duly signed, and in conformity with the provisions of the act 4 Geo. 4, c. 95, s. 89, was served on the convicting justice, and that, on the 12th of May, the appellant entered into the sureties required by the statute; that the appeal came on to be heard at sessions on the 6th of July, and that the appellant was then in Court with his witnesses, prepared to prosecute his appeal: that on the appeal being called on, the counsel for the respondent, without requiring service of the notice of appeal, or any other fact to be proved, applied to have the hearing of the appeal adjourned to the next session, on the grounds that one Otway, by whom the information and complaint before the convicting justice had been laid, could not then attend

nizance, but objected to the appeal being heard, on the ground that the notice of appeal was not served within the time prescribed by the act, for that the said act required the notice to be served "within six days after the cause of such complaint," having arisen, and that more than six days had elapsed in the present case between the time of the conviction and the service of the notice of appeal, and that thereupon the Court of Quarter Sessions acted upon the said objection, and refused to hear the said appeal, and the conviction was confirmed.

1843.
REGINA
v.
The Justices of
MIDDLESEX.

Clarkson and *Chambers* now appeared to shew cause, and produced affidavits in answer.

Bodkin, in support of the rule, objected to their being heard. This rule was drawn up, calling upon the convicting magistrate, and upon Otway, who was the informer, to shew cause. From the affidavits on the other side, it did not appear that counsel were instructed by either of these persons; but on the contrary it appeared, that they were instructed by the attorney for the lessees of the roads, who, in his affidavit, distinctly stated, that he was retained by the lessees, for the purpose of supporting the conviction. These parties were altogether strangers both to this rule, and to the appeal, and could not be heard. The case of *Johnson v. Marriat* (a), was like this, in principle, and supported the objection; for there, it was held, that a party upon whom a rule did not call, could not be heard, although he was served with the rule, and that if he did, the Court would not give him the costs of his appearance.

WILLIAMS, J.—I do not think this objection can prevail. The counsel who appear to shew cause must go on.

Clarkson and *Chambers*. The affidavits in answer to

(a) *Ante*, vol. 2, p. 343, O. S.; S. C. 2 Cr. & M. 183.

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v.
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those on which this rule had been obtained, denied that the appeal had been adjourned on the 6th of July, on the application of the respondent, or that the absence of Otway, the informer, had been relied upon as a reason for such adjournment; it was sworn that Otway was only introduced into the case as the informer; that he was a police officer, and that he had nothing to do with the case, in point of fact; that the appeal was adjourned on the 6th of July, on account of the great pressure of business at sessions on that day, and that, on the occasion of the second adjournment, such adjournment was made entirely to suit the convenience of counsel, whose professional duties called them elsewhere on the day in question. With regard to the objection raised at sessions, it was submitted that it was valid, and fatal to the appeal. The statute 4 Geo. 4, c. 95, s. 87, provided, "that if any person shall think himself aggrieved by any order, judgment, or determination made, or by any matter or thing done by any justice or justices of the peace, &c., in pursuance of this act, &c., such person may appeal to the justices of the peace, at the next general or quarter sessions of the peace, to be held for the county, &c., wherein the cause of such complaint shall arise, such appellant first giving, or causing to be given to such justice, &c., notice in writing of his intention to bring such appeal and of the matter thereof, within six days after the cause

Monday the 9th, which was the seventh day. There was nothing even to shew that a notice of appeal, served on a Sunday, would be bad; for a notice of appeal could hardly be said to be "any writ, process, warrant, judgment, or decree," service of which, if made on the Lord's day, was rendered void by the 29 Car. 2, c. 7, s. 6. Arguing by analogy to the proceedings of the Courts of law, it would clearly appear, that the Sunday must be reckoned in, because, by the Reg. Gen., H. T., 2 Wm. 4, s. 8 (a), it was ordered, "that in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, &c., in which case the time shall be reckoned exclusively of that day also." This was an objection which went to the very question of the jurisdiction of the Court of Quarter Sessions in the case, and if it were made out, the effect of it was, that it could not be waived either by any act of the Court of Quarter Sessions, or of the respondents, for it deprived the appellants of all locus standi in Court. *Rex v. Justices of Oxfordshire* (b).

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Bodkin, in support of the rule. It was admitted on the other side, that the appellant was entitled to reckon the six days exclusive of the day on which the conviction took place. The argument that service of the notice of appeal on a Sunday would be good, could not be supported; for the proper observance of the Sabbath would prevent the Court from giving any effect to acts done on that day. Sunday, however, was in this case, the sixth day from the day of conviction, and the question was whether the appellant was to anticipate that day, and serve his notice of appeal on the fifth day, or whether the Court would not adopt the more liberal view of the case, and hold him to

(a) *Ante*, vol. 1, p. 200, O. S.

(b) 1 M. & Sel. 446.

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be entitled to pass over the Sunday, and to serve his notice on Monday. This was in fact the effect of the rule of Court, H. T. 2 Wm. 4, already cited: for although it was provided that where Sunday fell upon any day but the last day, it should be reckoned, still where it was the last day, it was to be reckoned exclusively, and the party was entitled to the additional day. The rule of Court was declaratory merely, and confirmed that which had been previously adopted as the practice. It would be convenient that the same practice should prevail in the computation of time in every species of proceeding. But secondly, this objection had been waived. It might be admitted to be the rule, that where the Court of Quarter Sessions, of its own authority, postponed the consideration of any question brought before it, such postponement had no operation to give the Court any jurisdiction which it did not before possess. Here, however, the adjournments had been the acts of the parties themselves, and it was clear that they could waive any technical objections. Admitting that the adjournment of the 6th of July was the act of the Court, it appeared from the entry in the book of the clerk of the peace, as it was sworn that the appeal was on the 7th of August "adjourned by the consent of counsel." This then was an act of the parties, for it was not said that counsel were then acting in pursuance of any arrangement to meet

c. 95. The notice of appeal is required by the 87th section of the statute to be given "within six days after" the cause of complaint shall have arisen. The conviction in this case took place on Monday the 2nd of May; the notice of appeal was served on Monday the 9th of May, the 8th being Sunday. It was contended that this notice was sufficient, because the sixth day fell on a Sunday, and that the party had therefore the Monday, in which to give his notice of appeal; and it was also urged, that the appeal having been respited from session to session, the notice of appeal was thereby dispensed with, or the objection on the ground of its supposed insufficiency was waived. In respect to the latter point, the case of *Rex v. The Justices of Hertfordshire* was cited. There, a notice of appeal (against a rate) containing the grounds of appeal, was served in due time for trial at the first sessions, and was ready for proof there, but was not proved or admitted, the respondents obtaining an order of respite on payment of costs, whereupon the notice was handed to the clerk of the peace, who made out the order of respite, inserting in it the grounds of appeal: and the Court held, that as the respondent had acted on the notice, the appellant was entitled to be heard at the following sessions, without proving any notice of appeal. There, it appeared that before the first session, a sufficient notice of appeal was given; and in a later case of *Rex v. The Justices of the West Riding of Yorkshire (a)*, which was not cited on the argument, the Judges considered the point now before me, and expressed a clear opinion that where there had been an adjournment, the respondents might, notwithstanding, call for proof of the original notice of appeal, which in that case also was good, as they were not entitled to call for notice of appeal to the then sessions, to which the adjournment had been made. I think, therefore, that the question whether the original notice in this case was sufficient ne-

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(a) 5 B. & Ad. 667; S. C. 2 N. & M. 390.

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cessarily arises here; and on this point I do not feel myself called upon to question the propriety or consider the effect of the rules of Court in civil cases; and still less do I think that I should consider the question whether service on the Sunday would be sufficient. But the question which I have to determine arises upon the distinct language of the statute: and upon that language how can I say that this notice was given *within* six days? It was indeed conceded that it was not; but it was argued that Sunday ought not to be reckoned in the computation. No authority is cited in support of this argument, and in the absence of one, I think that the plain words of the act are not to be got rid of. And I feel the less regret at coming to this conclusion, because there were five clear days in which the notice might have been served; but, the appellant chose to neglect them, and to raise this discussion. This rule must be discharged, but without costs, as I think that there was far too much doubt about it to entitle the parties called upon by this rule to ask for them.

Rule discharged accordingly.

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been moved, stated, that on the 30th of October, 1841, a citation was issued from the Consistory Court of St. David's, against the applicant, to answer the Rev. T. B. Gwyn, in a certain cause of defamation, or slander; that on the 11th of November in that year, the applicant duly appeared by her proctor, and that on the 13th January, 1842, Mr. Gwyn exhibited and filed his libel or allegation; that the libel stated, that in the months of September and October, 1841, the said Mary Evans, "in an angry, reproachful, malicious, and invidious manner, several times or at least once, in the presence and hearing of divers credible persons (who then and there understood the Welch language), did defame the said Rev. T. B. Gwyn, who was and is a person of good reputation and character, and charged him, the said, &c., with intoxication and indecency, and speaking of and meaning, and intending the said, &c., sayed, affirmed, and published, several times or at least once, certain scandalous, opprobrious, and defamatory words, that is to say, &c., which said several Welch words and expressions, being translated into the English language, have in their ordinary interpretation the following sense and meaning, that is to say: "What time did your master come home last night? was he sober? the blackguard was drunk; he must have been." The libel then set out some more words in the Welch language, and proceeded, "which said several Welch words and expressions, being translated into the English language, have, in their ordinary interpretation, the following sense and meaning, that is to say: 'He, on the night before, on his way from Carmarthen, overtook me on the high road, and attempted to throw me and my horse into the ditch; also put his hand under my safeguard, and then shoved it up under my petticoat, until it reached my knee; I struck him with my whip, and galloped off;' or words to the like tenor or effect, tending to injure the good name, fame, and reputation, of the said Rev. T. B. Gwyn, and meaning by such words (amongst other things), that, on the said occasion, the said Rev. T. B. Gwyn was

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not sober, and that he wanted to violate the person of her the said Mary Evans, or that he otherwise conducted or wanted to conduct himself indecently and incontinently towards her." The affidavit further stated, that the said libel, on the 10th of February, 1842, was admitted by the presiding Judge of the Consistory Court, and that on the 14th of April, the proctor of the applicant pleaded negatively to the said libel; that the cause came on for hearing before the Rev. D. A. Williams, clerk, as the presiding Judge of the said Court, on the 12th of May, whereupon the said Consistory Court proceeded to examine into the truth of the said libel, by the examination of witnesses, whereby it did appear to the said Court that the said libel was proved, and the said Rev. D. A. Williams, as such Judge, proceeded to make a decree that the said libel was proved, and thereupon minutes of such his decree were entered on the books of the deputy registrar of the Court, whereof the following is a copy: "Decree by the Court; words libelled, proven, and that party respondent pay the costs of this suit." The affidavit alleged further, that the decree was protested against by the proctor of the applicant, and that it had not yet been enforced against the applicant. The following decree, as finally drawn up, was admitted by both. The decree, as finally drawn up, and admitted by both sides, found, "That the said Mary Evans did, in

was discharged in consequence of a defect in the title of the affidavits (a). The present rule had been subsequently moved upon amended affidavits; but it was submitted that the subject matter of the motion having been already disposed of, the Court would not sanction a second application founded upon the same grounds. But upon the merits also the rule must be discharged. The foundation of the application was, that the spiritual Court had exceeded its jurisdiction, and that the matters complained of in the libel were of temporal and not of spiritual cognizance. From the case of *Full v. Hutchins* (b), it appeared, that where a matter is properly triable at common law, prohibition lies before sentence, but that if a party submits to trial, it is afterwards too late. In *Stainbank v. Bradshaw* (c), the same rule was laid down. In the present instance the applicant had pleaded negatively to the libel, and had submitted to a trial, and a decree had been made, and it was therefore incompetent for her now to come to the Court. *Carslake v. Mapledoram* (d), bore out this objection, and further shewed that in such a case it was incumbent on the party making the application, to satisfy the Court clearly, that the spiritual Court had no jurisdiction. In *Hart v. Marsh* (e), Lord Denman, in his judgment said, "To set aside proceedings after sentence, it should be shewn that the Court has already exercised a jurisdiction which it did not possess." In that case the Consistory Court of Hereford, upon articles exhibited against a beneficed clerk, pronounced sentence that the said articles were for the most part, sufficiently and fully proved, and suspended him for three years; after sentence, a rule for a prohibition was obtained, on the suggestion that some of the articles contained charges cognizable in Courts of common law; but it was not denied that others were of eccle-

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(a) *Ex parte Evans*, ante, p.

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(b) Cowp. 422.

(c) 10 East, 349, note (c).

(d) 2 T. R. 473.

(e) 5 Ad. & El. 591; S. C. 1 N. & P. 62; *Ante*, vol. 5, p. 424, O. S.

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siastical cognizance; and it was held, that after this sentence it must be presumed that the Ecclesiastical Court had proceeded upon such matters, as were within its cognizance, and the rule was discharged. From that decision it seemed clearly to follow that the applicant must shew that the spiritual Court had exceeded its jurisdiction, but for anything that appeared in the present case, that Court had confined its decree to matters of purely ecclesiastical cognizance. The sentence did not, in its terms, find that all the words were proved; but only that "the said Mary Evans did, &c. maliciously say, publish, and report several scandalous, reproachful, and defamatory words in the said libel mentioned." It did not find that she had spoken *the* several words, which would have included the whole, and if any of the words formed matter of ecclesiastical cognizance, the decree might have proceeded on them, and the prohibition would not go. The allegations in the libel, by no means confined the decree to any precise form of words; for the expressions laid were not alleged with absolute certainty, but the words stated were alleged to have been used, "or words to the like tenor or effect." Then, were all the matters here alleged, or any of them, triable before an Ecclesiastical Court? The first important expression stated to have been used in reference to Mr. Gwyn, was, "The blackguard was

punishable by ecclesiastical censures, was in itself a matter cognizable by the Ecclesiastical Courts. The third offence imputed by the words said to have been used, was that of indecency, accompanied with violence, and the act alleged, if done without the consent of the party, would undoubtedly amount to an offence of temporal cognizance, namely, an assault. It was consistent, both with the allegation and the finding, however, that the consent of the applicant was not withheld, and if that were so, the charge was reduced to that of mere indecency. To impute indecent conduct merely to an individual, afforded no cause of action; but to impute indecent conduct to a clergyman, was to allege an offence of which the Ecclesiastical Courts clearly had cognizance. It rested upon the applicant, however, to prove that none of the offences, alleged by the words used, were of ecclesiastical cognizance. Or even if it should be shewn that some or all of the words were actionable, it lay upon her to prove that the matters in reference to which those words were used, were not cases in which the ecclesiastical and the temporal Courts had concurrent jurisdiction, for it might be that a party might proceed in the Ecclesiastical Court, *pro salute animæ*, and that he might also proceed at common law to obtain compensation in damages for the personal injury inflicted upon him. He referred to *Bac. Abr.* tit. "*Prohibition*," (L 5). *Slader v. Smalbrooke* (a), *Evans v. Brown* (b).

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E. V. Williams in support of the rule. First, this was not a case in which the rule contended for on the other side, that the application could not be renewed, applied. [*Williams, J.*—You may pass that objection, I do not think it can be sustained]. Secondly, the application was not too late, if the Court below had taken upon itself to decide upon matters over which it had no jurisdiction, and the fact of sentence having been decreed, made no difference.

(a) 1 Lev. 138.

(b) 2 Ld. Raym. 1101.

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Com. Dig. tit. "*Prohibition*," (D.) Upon general principles, in cases of slander, the Ecclesiastical Court had jurisdiction only where they possessed the power to punish the offence imputed by the slanderous words, and where the punishment of such offence was exclusively within their province. 2 *Burn's Ecclesiastical Law*, by *Phillimore*, p. 126, *Hollingshead's case* (a), *Galizard v. Rigault* (b). Then did the libel in this case impute any offence cognizable by the Courts of common law. It was submitted that it did, for that the words alleged to have been used, clearly imputed to Mr. Gwyn the commission of a battery as well as an assault, and this being an indictable offence, the jurisdiction of the Ecclesiastical Court was ousted, and the writ of prohibition must go. The sentence did not bear the limited construction put upon it by the other side, but in saying that Mary Evans had used "several scandalous words in the libel mentioned," it meant that the whole of the words alleged, had been proved. If that were so, the words charging the temporal offence, must be taken to have been proved. But the Ecclesiastical Court had no jurisdiction in respect of any of the matters alleged. To call a clergyman a blackguard, was not to impute to him any offence of ecclesiastical cognizance, and if no such offence was alleged, the Spiritual Court possessed no power to entertain a suit for the use of such words. To say a

cited, that the prohibition must still go, for that to entitle them to retain the cause, they must possess exclusive jurisdiction. That part of the allegations was matter of ecclesiastical cognizance, was immaterial where the whole were so mixed up as not to be distinguished from each other or separated. *Grimes v. Lovel* (a), 2 *Burn's Ecclesiastical Law*, p. 128, and a case of *Legat v. Wright* (b), there cited.

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Cur. adv. vult.

WILLIAMS, J.—This case was discussed before me a few days ago. It was a motion for a prohibition to stay proceedings in the Consistory Court of the Bishop of St. Davids, after sentence pronounced therein. Several questions were raised in the course of the argument, and the first of these was, whether the application came too late? Upon that point, however, I entertain no doubt. It seems, to me, to be clear that the application is not too late if an excess of jurisdiction appears; that is to be considered as being either decided or recognised in *Carslake v. Mapledoram*, (c), and *Hart v. Marsh* (d). But it appears, from those cases, that the onus of shewing such want of jurisdiction is cast on the party applying. The other questions discussed, resolve themselves into this,—whether that want of jurisdiction is here shewn? Here, however, there are not, as there were in *Hart v. Marsh*, some matters of ecclesiastical, some of temporal cognizance. In that case the sentence was founded on some of the charges only, and there was nothing to shew that the sentence did not proceed on those of ecclesiastical cognizance only. Here is an article not charging misconduct only, but the libel charges the defamation of a spiritual person, and it imputes an offence, or offences, also of temporal cognizance. There are authorities to shew that where in libels for defamation, in the Ecclesiastical Courts, the defamation consists of

(a) 1 *Ld. Raym.* 446.

(b) 2 *Jur. Eccl.* 215.

(c) 2 *T. R.* 473.

(d) 5 *Ad. & El.* 591.

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temporal offences only, the jurisdiction of the Ecclesiastical Courts is ousted, and prohibition will lie. *Evans v. Brown* (a), *Hollingshead's case* (b), and a case of *Legat v. Wright*, is cited by Mr. *Burn* as an authority. But there is a difficulty, whether the sentence in this case must be understood as proceeding at all on that part of the words which impute a temporal offence—a proposition which should be clearly established before this rule is made absolute. This is my impression at present, but I shall enlarge the rule, and give the defendant below an opportunity of declaring in prohibition, if he shall be so advised, by which means, the whole matter will be brought before the Court. I am the more inclined to do so, because I find an indisposition to make such a rule absolute, when a question of costs is the subject of dispute. I will give the defendant time to declare, up to the first day of next Term, and if she fails to do so in that time, the rule must be discharged.

Rule accordingly.

(a) 2 Ld. Raym. 1101.

(b) Cro. Car. 229.

COURT OF EXCHEQUER.

Hilary Term.

IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

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CASE for injury to the plaintiff's reversion in certain premises, by reason of the defendant permitting the continuance of a wall, rooms, and gutter, alleged to have been wrongfully erected by the defendant's devisor. There was a second count for pulling down a board affixed to the plaintiff's premises, and thereby injuring a wall. Plea, not guilty.

The cause came on for trial, before *Coltman*, J., at the last Sussex Assizes, when a verdict for the plaintiff was taken by consent, subject to a reference of the cause, and all matters in difference between the parties. The order of reference authorized the arbitrator to direct that a verdict should be entered for the plaintiff or the defendant, as he should think proper, and to determine what he should think fit to be done by either of the parties with respect to the matters in difference between them. The house and premises, in question, adjoined the house of the defendant, who was tenant for life, and the matters in difference between the parties were, whether the defendant had a right to use the plaintiff's back wall for the inside of her rooms, and to plaster and paint it, and to carry water round the

An action for injury to the plaintiff's reversion in certain premises, was referred by order of *Nisi Prius*, which empowered the arbitrator to direct a verdict for plaintiff or defendant, and to determine what he should think fit to be done by either party. The arbitrator was requested by the defendant to arrest the judgment, but he refused, and awarded that the verdict for the plaintiff should stand, except as to the second count; that the damages should be reduced to 1s., and that the action was

brought to try a right: *Held*, first, that the arbitrator had no power to order the judgment to be arrested: Secondly, that the arbitrator was not bound to state what right the action was brought to try: Thirdly, (*Purke*, B., dissentiente,) that the arbitrator was not bound to order something to be done by the parties.

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plaintiff's chimney to the lead flat over the plaintiff's premises, and whether she had a right to the support of the plaintiff's wall. The arbitrator viewed the premises, and directed the parties to state to him, in writing, those matters which were not in issue in the cause, but on which he was to adjudicate. Certain matters, not in issue in the cause, were, in consequence, submitted to him, but he was not expressly required, in writing, to adjudicate upon them. The defendant's counsel contended before the arbitrator, that the first count of the declaration was bad, and that in case he found the issue raised thereon for the plaintiff, he was bound to arrest the judgment on that count. The arbitrator refused so to do, and he made his award, in which he recited that the only matter in difference beyond those in difference in the action, were the use by the defendant of the plaintiff's back wall, and the plastering and painting the same, in the carrying the water round the plaintiff's chimney, and for injuring the plastering and the timbers of the plaintiff's room. He then awarded that the verdict should stand as to all the issues, except so much of the first issue as related to the second count, and as to that issue, that it should be entered for the defendant, that the damages should be reduced to one shilling, and he certified that the action was brought to try a right, besides the mere right to recover damages. He then awarded that as to the

on the issue on the first count, or whether judgment thereon should be arrested, and because he had not ordered the judgment to be arrested. Fourthly, that he had not determined what right the action is brought to try, besides the right to damages. Fifthly, that he had not ordered what should be done by the parties.

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Thesiger and *Ogle* shewed case. As to the two first objections, it is sufficient to say that the matters referred to, were not submitted to the arbitrator in writing. With respect to the third objection, the arbitrator had no authority to determine whether judgment should be given for the plaintiff, or whether it should be arrested, his power was over the verdict only. As to the fourth objection, it sufficiently appears, by the record, what was the nature of the right in dispute between the parties. The answer to the last objection is, that the arbitrator could not award anything to be done by the parties. If he had directed an alteration of the premises, the tenant might have maintained an action of trespass not only against the parties concerned in making it, but also against the arbitrator himself. Under such circumstances, he was not bound to direct any step to be taken, *Manser v. Caver* (a).

Peacock in support of the rule. It does not appear, by the award, what the right is in respect of which the damages are given, and the defendant may still be liable to an action for the continuance of the same trespasses. The arbitrator was bound to direct what should be done by the parties. He might, at least, have ordered the defendant to pay a sum of money to the plaintiff, or in some way to acknowledge the plaintiff's right. When a cause was referred, and the costs of the reference and award were to be in the discretion of the arbitrator, "who shall ascertain the same;" it was held that he was bound so to

(a) 3 B. & Adol. 295.

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do, *Morgan v. Smith* (a). If the arbitrator had said that nothing further should be done by the parties, that would have been sufficient, but the present award leaves the defendant subject to another action, *Ross v. Clifton* (b), *In re Tribe and Upperton* (c). The arbitrator had power over the judgment as well as the verdict. Where a cause is referred in which there are issues in law as well as issues in fact, the arbitrator is bound to determine both. [*Parke*, B.—Suppose an application had been made to the Court in due time to arrest the judgment, what would have become of the costs?] The costs would abide the event. [*Alderson*, B.—If the arbitrator had awarded that the judgment, should not be arrested, and the Court had ordered it to be arrested, the costs would still abide the event]. In *Mathew v. Davis* (d), a cause and all matters in difference, were referred to a legal arbitrator, pending a demurrer to one of the defendant's pleas, and the arbitrator, by his award, directed judgment to be entered on that demurrer for the defendant, the Court refused to set aside his award on that ground. Here the arbitrator was requested to determine whether or no the declaration was sufficient.

Lord ABINGER, C. B.—The first point to be considered is as to arresting the judgment, and if we were to decide in favour of this application, it would afford a precedent for

a verdict, it is generally understood that he is only to assess the damages. No order of reference ever yet empowered an arbitrator to give judgment, still less to declare that judgment should be arrested. Secondly, the arbitrator was to direct what ought to be done by either of the parties. The words of the order of reference are, "what he should think fit to be done," that involves the term "in his discretion." If a strict interpretation is to be put upon these words, and he must order something or other to be done ; it might be contended, that the most trifling act would suffice. The ordering a candle to be lighted and blown out again, would be a compliance with the order of reference. I take it for granted that it is not contended that the arbitrator is bound to say that he thinks nothing shall be done, and if so, is he bound to say that he does not think anything is to be done ?

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PARKE, B.—All the objections have been answered, except one, and I am inclined to consider that fatal to the award. As to the two first objections, the arbitrator has decided on all matters in difference specifically referred to him in writing. With regard to the matters in difference in the cause, I take them to be the matters in issue on this occasion. If there is any grievance included in the declaration, which is so general as to raise no particular issue upon it, so that the arbitrator could not determine it as a matter of difference in the cause, it was incumbent on the defendant to have such matter decided as a matter in difference not in issue, and to have brought it specifically before the arbitrator. The second objection, in truth, amounts to the same. The third objection is as to arresting the judgment, and I think that the order of reference gives no power, by implication, to enter up judgment, or to order it to be arrested. According to the construction which I put on this submission, the arbitrator is placed in the situation of a jury for the purpose of deciding the verdict and no more ; he is to direct for what amount the

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verdict is to be entered, and the cause is referred for no purpose ulterior to that. It is never meant that the arbitrator should have power to enter up judgment, and if he had no power to enter up judgment, he had none to arrest the judgment. Another objection is, that the arbitrator has not determined what right the action was brought to try. But there is really nothing in that objection. The arbitrator is placed in the same situation as a Judge at nisi prius for the purpose of costs, and he certifies that action is brought not merely for damages, but to try a right. He has done sufficient, and no man can doubt what the right was; the only question being, whether or no the trespasses alleged to have been committed by the defendant, were done as a matter of right or not? As to the last objection, my impression is that the award is bad. If a power is given to an arbitrator to direct a verdict to be entered, and to determine what is to be done by either of the parties, it is not in his discretion whether or no he will direct anything to be done. If the words had been with "power to determine what he should think fit to be done," this award would have been good. But that is not so, and the words of the submission must be real according to their grammatical construction, viz., with power "to direct a verdict, and to determine what he should think fit to be done, &c." that is, that he shall make such regulations

at the end of the Term, or to order some compensation to be made to the plaintiff for the continuance of the injury. I cannot help thinking that some direction might have been given. The intention was, that all disputes should be terminated, but nothing has been done to prevent the plaintiff from bringing a fresh action for the continuance of the injury.

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ALDERSON, B.—I am of the same opinion with the Lord Chief Baron, and I agree with my Brother Parke in all but the last point. I construe the words of the submission as giving simply a power to determine what the arbitrator shall think fit to be done. That is different from a case in which the arbitrator is bound absolutely to direct something to be done. The amount and the quality only of the thing to be done, being left to his discretion. In that case he must direct, as for instance, to give costs to such an amount as he shall think fit. But if the parties give to the arbitrator what is in its nature a mere liberty of awarding what he shall think fit to be done, that is merely a power to award respecting something further than the matters in difference, as well as respecting those things which are the matters in difference. If the arbitrator found anything further which he could order to be done, those words are to be construed as giving him a power so to order. In this case he has omitted to exercise it, because he could not exercise it without committing a trespass. With respect to the other point, in my opinion, it is perfectly clear. If Mr. *Peacock's* argument, as to arresting the judgment, is well founded, why insert a clause upon the order of reference that no writ of error shall be brought? But what conclusively determines the point is this, that as an arbitrator is the Judge both of the law and fact, then upon every question which arises incidentally, he would be bound to say whether, upon the whole cause, there shall or shall not be an arrest of judgment. Such a doctrine would invalidate every award ever made. But,

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further, if he should make any decision as to the judgment, the writ of error would be taken away by that very act; yet when the Court give him a power to determine the cause, the parties agree that there shall be no writ of error, such a stipulation would be perfectly useless.

GURNEY, B., concurred.

Rule discharged.

STEWART, Public Officer v. DUNN, Public Officer.

Where a banking copartnership is sued in the name of their public officer, the Court will not permit the latter, though a member, to plead his individual bankruptcy together with other pleas, the plaintiff undertaking not to sue out execution against his body, land, or goods.

DEBT by the East of England Bank, who sued in the name of their public officer, against the Southern District Banking Company, who were sued in the name of their public officer, who was also a shareholder. The declaration contained counts for money lent, money paid, money had and received, interest, work and labour, and for money due on an account stated.

A summons having been taken out to plead several matters, *Rolfe*, B., ordered that the defendant be at liberty to plead the following pleas: first, *nunquam indebted*; secondly, payment; thirdly, set-off; fourthly, that plaintiff was not public officer as alleged; fifthly, that defendant was not public officer as alleged; sixthly, that

public officer in his private capacity affords no answer to this action, which is against the Company. The 12th sect. of the 7 Geo. 4, c. 46, which regulates banking co-partnerships, enacts, that "all and every judgment and judgments, decree or decrees, which shall at any time after the passing of this act be had or recovered, or entered up as aforesaid, in any action, suit, or proceedings in law or equity, against any public officer of any such co-partnership, shall have the like effect and operation upon and against the property of such co-partnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such co-partnership, and that the bankruptcy, insolvency, or stopping payment of any such public officer for the time being of such co-partnership, in his individual character or capacity, shall not be, nor be construed to be the bankruptcy, insolvency, or stopping payment of such co-partnership, and that such co-partnership, and every member thereof, and the capital, stock, and effects of such co-partnership, and the effects of every member of such co-partnership shall in all cases, notwithstanding the bankruptcy, insolvency, or stopping payment of any such public officer be attached and attachable, and be in all respects liable to the lawful claims and demands of the creditor and creditors of such co-partnership, or of any member or members thereof, as if no such bankruptcy, insolvency, or stopping payment of such public officer of such co-partnership had happened or taken place." The same point was before the Court in *Wood v. Marston* (a), and there, Lord Abinger, C. B., says, the bankruptcy ought not to be pleaded to the whole action, but only so far as the defendant is concerned. If, however, the plaintiff will give an undertaking not to take out execution against the defendant's private estate, the plea may be struck out." In the present case, the same undertaking was offered

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(a) *Ante*, vol. 7, p. 865, O. S.

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before the learned Judge at Chambers. It will probably be contended, on the other side, that the defendant is not bound to accept the undertaking, because if he should afterwards become possessed of landed property, the judgment would be a charge upon it, but this proceeding is not against him in his private capacity, but as public officer, and this Court has lately held (*a*), that in the case of a banking co-partnership established under the 7 Geo. 4, c. 46, and having a public officer resident in England, the individual members of the Company are not liable to be sued, and that the only remedy is against the Company by their public officer. The proposed plea alleges as a defence to the whole action that which in fact constitutes a defence to part only. Perhaps it will be urged that the defendant wishes to take the opinion of the Court as to the validity of the defence, but if so he should plead it alone, instead of applying under the Statute of Anne for leave to plead several matters. The subject was before the Court of Queen's Bench yesterday and though the Court did not decide the point, they intimated that they would not allow a defendant sued as a public officer to place upon the record any defence which would be available to him in his private capacity, that if he chose to plead his bankruptcy alone, possibly they had no power to prevent it, but in an application under the Statute of Anne they had an absolute

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suggestion of the Court. Bankruptcy is a defence given by statute, and of which a defendant has as clear a right to avail himself as of a plea of the Statute of Limitations, or any other defence created by act of Parliament. It is true that so far as regards the other person for whom he is sued as a trustee, the plea would be no answer, but if it is not good in point of law, the objection can be taken on demurrer. The undertaking not to issue execution against the defendant would not afford a sufficient protection, as the judgment would operate as a charge upon the defendant's lands. [*Parke, B.*—The judgment could only be made available against the lands by means of an *elegit*, which is an execution, and which, therefore, the plaintiff would be precluded by his undertaking from issuing]. The learned Judge was asked for leave to plead a plea of bankruptcy, but whether or no it should be in the usual form was a matter for subsequent consideration. [*Parke, B.*—We must assume that you asked to plead it in bar of the whole action]. If the plaintiff had no other remedy, there might be some ground for imposing terms, but there are two public officers, and the bankruptcy took place before action brought.

Lord ABINGER, C. B.—The Court will not permit a party sued as a public officer to plead several matters, and also to plead a plea of his bankruptcy. Besides, the plea is clearly bad, as the action is brought against a company, and it is just the same as if the action was brought against two hundred shareholders, and one of them were to plead his bankruptcy in bar of the whole action. The statute makes the public officer defendant as the representative of the shareholders, and if he is permitted to plead a matter personal to himself in bar of the action, he thereby confers on those whom he represents a benefit which the Legislature certainly never intended. We are all of opinion that the learned Judge was perfectly right in rejecting the plea. The rule will be discharged with

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costs, the plaintiff undertaking not to issue execution against the body, lands, or goods of the defendant.

PARKE, ALDERSON, and ROLFE, B.s, concurred.

Rule discharged accordingly.

GIBBONS v. SPALDING.

Where a defendant arrested by a Judge's order, under the 1 & 2 Vict. c. 110, applies to the Court for his discharge under the 6th section, the plaintiff may use additional affidavits in shewing cause against the application.

THE defendant in this case was arrested by virtue of a writ of capias issued upon a Judge's order.

Thesiger had obtained a rule nisi for his discharge, under the 6th section of the 1 & 2 Vict. c. 110, s. 3, which enacts, "that it shall be lawful for any person arrested on any such writ of capias, to apply, at any time after such arrest, to a Judge of one of the Superior Courts, at Westminster, or to the Court in which the action shall have been commenced for an order or rule on the plaintiff in such action, to shew cause, why the person arrested, should not be discharged out of custody, and that it shall be lawful for such Judge or Court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein, as to such Judge or Court shall seem fit."

The *Attorney General* contra, urged that it was in the discretion of the Court to limit the right of producing additional affidavits, and that the restriction contended for, would impose a great hardship on the party. He referred to *Pike v. Davis* (a).

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PARKE, B.—Every opportunity is afforded to a defendant, to get out of custody, by authorizing the Court or a Judge to discharge him. In support of that application, he produces affidavits, containing new matter, and why should not the plaintiff oppose the application with fresh affidavits, especially when he could not have applied to the Court in the first instance?

ALDERSON, B.—If this objection were valid, it would apply to every order of a Judge in a cause. It is not correct to say, that the Court only entertain the application by way of appeal from the Judge at Chambers; on the contrary, when the parties come before the Court, both should be fully and fairly heard.

The *Attorney General* then shewed cause upon the merits, and the rule was subsequently discharged.

(a) *Ante*, vol. 8, p. 387, O. S.

NEVILL and Others v. BOYLE.

ASSUMPSIT. The five first counts of the declaration were on bills of exchange, respectively dated the 2nd of March,

To a declaration containing counts on several bills of

exchange, for goods sold, &c., the defendant pleaded a release.

The replication set out a deed, by which the plaintiffs and other creditors of the defendant, agreed to release the defendant from their claims, upon his paying them a composition, and giving them certain promissory notes for the amount, with a proviso, that in case of default in payment of any or either of the notes, the release should be void; the replication then averred default in payment of one of the notes.

Rejoinder, that before default, the defendant delivered to the plaintiffs another promissory note in lieu of the note dishonoured.

Held, that the rejoinder was a departure from the plea.

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1st of April, 1st of May, 1st of June, and 1st of July, 1840. The sixth was on a promissory note, dated 21st of January, 1841, and there were counts for goods sold and delivered, money paid, interest, and on an account stated. Plea, First, as to all the declaration, except the sixth count, that after the accruer of the causes of action, in the declaration mentioned, and each and every of them (except as aforesaid), and before the commencement of this suit, to wit; on the 25th of July, A. D. 1840, by a certain indenture then made by and between the defendant of the one part, and the plaintiffs and divers other persons, then being creditors of the defendant (whose names were and are to the said indenture subscribed, and seals thereto fixed) of the other part (profert), they, the plaintiffs, did release to the defendant, all and every the debts and causes of action in the declaration mentioned, except as before excepted. Verification. Second, as to the sixth count, payment into Court, and no damage ultra.

The replication to the first plea set out the deed, on oyer, executed by the defendant of the one part, and the plaintiffs and other creditors of the defendant of the other part, and thereby the defendant did, for himself, his executors, and administrators, covenant, promise, and agree with and to the said several persons, parties thereto of the second part; that he the said Edward Boyle, should and

sory notes of the said E. B., at six months from the day of the date of these presents, and the sum of five shillings and sixpence in the pound, on the amount of said debts, by two equal instalments of two shillings and ninepence in the pound, to be secured by the joint and several promissory notes of the said E. B. and Thomas Pocock, bearing date as aforesaid, payable at nine and twelve months from the day of the date of those presents, to the said persons parties thereto, and their partners respectively, or to their order, for the proportion, and at the dates aforesaid, and which said promissory notes for the sum of eleven shillings in the pound, were paid to the said several persons, parties thereto, of the second part, at the time of their severally sealing and delivering these presents, in full satisfaction and discharge of the said debts so due to them the said persons respectively, from the said E. B., and that he the said E. B., at the time of giving the said promissory notes as aforesaid, should pay the expenses incurred in and about the investigation of the affairs of the said E. B., and in and about carrying this arrangement into effect. And in consideration of the said covenant of the said E. B., and of the promissory notes made and given by him to the said several creditors, parties thereto, of the second part, the receipt of which promissory notes, and that the same are received and taken in full payment, satisfaction, and discharge of the said debts due from the said E. B., to them the said several creditors, parties thereto of the second part, they the said several persons parties thereto, of the second part, do hereby, for themselves severally, and for their respective executors, administrators, partners, and assigns, admit and acknowledge (subject to the proviso hereinafter contained), they the said several persons, parties thereto, of the second part, do hereby, for themselves severally, and for respective executors, administrators, partners and assigns, remise, release, and for ever quit-claim and discharge the said E. B., his heirs, execu-

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tors, administrators, and assigns, and his and their lands, tenements, goods, chattels, estate and effects, from the said debts or sums of money, so due to them, the said persons parties thereto, of the second part, and affixed opposite to their respective names, as aforesaid, and all actions, suits, claims, and demands whatsoever, in respect of, or in any way relating to the same, and except the said promissory notes so given as aforesaid. Provided always, that in case default be made in payment of any or either of the said promissory notes, as and when they respectively become due and payable; that the agreement thereinbefore contained for accepting eleven shillings in the pound, and the release thereby given be void, and that the said original debts should become due and payable, as if such composition of eleven shillings in the pound had not been offered. The replication then averred, that the debts and sums of money, in the declaration mentioned, except in the sixth count thereof, become and were due and payable from the defendant to the plaintiffs, and the said causes of action in respect thereof, arose and accrued to the said plaintiffs, before and at the time of making the said indenture, and then remained and continued unpaid; and further, that the defendant afterwards, to wit, on the said 25th day of July, A. D. 1840, in pursuance of the said indenture, and at the time of making, sealing, and delivering

said promissory notes, so made by the defendant, and delivered to the plaintiffs as aforesaid, there was a certain promissory note, made by the defendant in writing, bearing date, to wit, on the said 25th day of July, A. D. 1840, and being one of the said two notes first above-mentioned, and thereby the defendant promised to pay to the plaintiffs 69*l.* 17*s.* 11*d.*, six months after the date thereof, and then delivered the same to the said plaintiffs in payment of part, to wit, the sum of 69*l.* 17*s.* 11*d.* of the said composition so covenanted to be paid by the defendant to the plaintiffs, as aforesaid, being the second instalment thereof. And that before and at the time when the said last mentioned promissory note was about to become due and payable, according to the tenor and effect thereof, to wit, on the 21st day of January, A. D. 1841, the same was in the hands and possession of certain persons, whose names are unknown to the plaintiffs, and that the defendant, not being then able to provide for or to pay, or to keep the same, the said plaintiffs afterwards, to wit, on the day and year last aforesaid, at the request of the defendant, and by and through the defendant, as their agent, in that behalf, but with their own proper monies, took up and discharged and paid to the said persons, whose names are so unknown to the plaintiffs the amount of the said note. And further, that thereupon, to wit, on the day and year last aforesaid, they the said plaintiffs, at the request of the defendant, took and received of and from the defendant, a certain other promissory note, then made and drawn by the defendant, and bearing date, to wit, the day and year last aforesaid, whereby the defendant promised to pay to the plaintiffs, 69*l.* 17*s.* 11*d.*, twelve months after the date thereof, which period had elapsed long before the commencement of this suit, and the defendant then delivered the said last mentioned note to the plaintiffs, in renewal of the said note, so by them the said plaintiffs taken up and paid and discharged as aforesaid. And the plaintiffs aver that at the time when the said last mentioned note became

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due and payable, according to the tenor and effect thereof, the same was dishonoured by the said defendant by non-payment thereof, and was not paid when due. Verification.

Rejoinder, that after the making by the defendant and the delivering to the plaintiffs of the promissory note in the replication mentioned, to wit, the said note bearing date, the 25th of July, A. D. 1840, and before the same became due and payable according to the tenor and effect thereof, and before any default had been made in payment thereof, according to the tenor and effect of the said indenture and the said proviso therein contained, to wit, on the 21st day of January, A. D. 1841, he, the defendant, in lieu and satisfaction of his said promissory note in the introductory part of this plea above, and in the said replication of the plaintiffs, respectively mentioned, delivered to the plaintiffs a certain promissory note in writing, signed by the defendant and one Thomas Pocock, bearing date, a certain day and year therein mentioned, to wit, the day and year last aforesaid, whereby the defendant and the said Thomas Pocock, jointly and severally, promised to pay to the plaintiffs, or their order, a certain large sum of money, to wit, 69*l.* 17*s.* 11*d.*, twelve months after the date thereof, which said last mentioned promissory note, the plaintiffs then accepted

been taken up, and paid, and discharged in manner and form, as in the said replication in that behalf alleged. Concluding to the country.

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Humfrey, in support of the demurrer. The rejoinder is a departure from the plea. The plea sets up an absolute release, but it appears from the deed as set out on oyer, that it was conditional only. The replication avers the condition to have been broken, which the rejoinder admits, but sets up a fresh agreement by which the plaintiff is precluded from taking advantage of the forfeiture. Another objection to the plea is, that it is pleaded to all the monies in the declaration, whereas it should have been confined to a part only.

Petersdorff, contra. The proper mode of objecting to the plea, would have been to set out the whole release, and then have demurred. [*Parke*, B.—It is enough for the defendant to plead the release, and then the defeazance must come from the plaintiff.] The rejoinder alleges in effect, that the condition imposed by the release has been performed by the defendant.

LORD ABINGER, C. B.—The rejoinder is bad. The defence set up is an absolute release of the cause of action. The replication shews the release to have been conditional, and subject to certain terms which have not been complied with. Then the rejoinder admits that fact, and seeks to avoid it by *ex post facto* matter. That is certainly a departure from the plea, and our judgment must be for the plaintiff.

PARKE, B.—The real ground of defence is, that there was an instrument under seal, which operated by way of accord and satisfaction. The replication shews that the instrument became void in consequence of a defeazance.

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Then the rejoinder in answer, alleges that other terms were substituted. That is inconsistent with the plea; in order to obtain the benefit of the release, the defendant should have shewn its condition, and the waiver of the forfeiture. Thus placing his entire defence upon the record in the first instance.

Judgment for Plaintiffs.

LEWIS v. The EARL of TANKERVILLE.

An application to set aside a warrant of attorney, on the ground of an insufficient attestation, can only be made at the instance of the party who has executed the warrant, or of some person claiming under, or authorized by him.

A RULE had been obtained, calling on the plaintiff to shew cause why a warrant of attorney, executed by the defendant, should not be set aside, on the ground that it was not attested by an attorney nominated by the defendant, as required by the 1 & 2 Vict. c. 110, s. 9.

Jervis shewed cause. The Court will not entertain an application of this description, unless it is made by the defendant himself, or by an attorney employed by him for that purpose. The defendant is resident abroad, and there is nothing to shew that he has given any authority or instruction to his attorney, to make this application. The affidavit on which the rule was obtained, merely states

Butt, in support of the rule. The statute does not require that the application shall be made by the defendant himself, nor is there any authority to support the objection. [Lord *Abinger*, C. B.—It is an established rule, that the process of the Court can only be altered on the motion of the defendant himself, or of an attorney authorized by him.] In this case a sufficient authority appears from the statement, that the attorney has the general conduct and management of the affairs of the defendant.

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LORD ABINGER, C. B.—There should either have been an affidavit by Lord Tankerville himself, or one stating that the attorney had an authority to make this particular application. That is too obvious a proposition to require any case to support it, and the rule must be discharged, with costs.

PARKE, B.—It ought either to be the application of the party himself, or of some one standing in his position, as for instance, the assignees of a bankrupt.

ALDERSON, B.—The affidavit does not state that the attorney is the attorney of Lord Tankerville for this particular purpose, and I think the Courts have never interfered without an affidavit of the party himself, or of some one claiming under, or authorized by him.

Rule discharged, with costs.

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 PRYOR v. PETTINGELL.

THIS was an action of account brought under the statute, 4 Ann. c. 16, s. 27.

A defendant in an action of account, having suffered judgment by default, the Court granted a rule, calling on him

Streeten moved for the appointment of auditors. The

to shew cause why he should not appear and consent to the appointment of auditors, or why a writ of *capias ad computandum* should not issue against him.

The 1 & 2 Vict. c. 110, does not affect the writ of *capias ad computandum*.

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peculiarity of this case was, that the defendant had suffered judgment by default. In all the cases to be found in the books under this form of action, the invariable course seems to have been for the defendant to appear, and in the event of a judgment quod computet, the appointment of auditors took place. *Archer v. Pritchard* (a). The course of proceeding in this form of action is fully stated in *Godfrey v. Saunders* (b), in which case auditors were appointed by the consent of the defendant. In *Selwin's Nisi Prius* (c), it is said, after judgment to account, the defendant usually offers to account, and thereupon the Court assigns auditors to take and declare the account between the parties. The auditors assigned, are generally some officers of the Court, who may convene the parties before them from day to day, until the account is determined. The question in this case is, whether the Court will appoint the auditors now, in the absence of the defendant, who may have had no notice of the application, or, whether they will first issue a writ of *capias ad computandum* to bring him before the Court? In which case a question may arise, as to whether that writ is not abolished by the 1 & 2 Vict. c. 110. [*Parke, B.*—Here there is a judgment.] The judgment is, that the defendant do account, which is interlocutory only.

PER CURIAM.—We think the writ is not affected by the 1 & 2 Vict. c. 110, the rule will, therefore, be absolute in the alternative.

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Rule absolute for issuing a *capias ad computandum*.

VANE v. WHITTINGTON.

THIS was an action by the drawer against the acceptor of a bill of exchange. The only plea was, "that the defendant did not accept the bill." The defendant's handwriting to the bill was admitted, under a Judge's order, made in pursuance of Reg. Gen., 4 Wm. 4, r. 20, but, upon the bill being produced at the trial, it appeared to be on a wrong stamp. The plaintiff was, in consequence, nonsuited, leave being reserved for him to move to enter a verdict for the amount of the bill.

A party who admits his handwriting to a bill of exchange, under Reg. Gen., 4 Wm. 4, r. 20, is not thereby precluded from objecting to the sufficiency of the stamp.

Bovill now moved accordingly. The admission by the defendant that he had accepted the bill, has precluded him from taking this objection. In *Starkie on Evidence* (a), it is said, "after consent to a Judge's order for the admission of an original instrument, or a counterpart of a deed, an objection cannot be taken to the insufficiency of the stamp." Where a party consented to admit a document described as a counterpart of a lease, and the instrument produced on the trial was executed by landlord as well as tenant, it was held, that the defendant, having consented to admit a counterpart of a lease, corresponding in date and parties with that produced, could not at the trial contend that the instrument produced was a lease, and, therefore, improperly stamped, *Doe d. Wright v. Smith* (b). If the admission is sufficient to give the plaintiff a verdict, he is entitled to it, without the production of the bill.

(a) Vol. 3, p. 1035, 3rd. ed.

(b) 8 Adol. & E. 255; S. C. 3 N. & P. 335.

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Lord ABINGER, C. B.—There is nothing whatever in the objection. The summons calls on the party to admit certain documents, “saving all just exceptions to the admissibility of such documents as evidence in the cause.” In the case cited, the instrument was admitted to be a counterpart, and the opposite party was entitled to rely on the admission to some extent. But this case is too clear to admit of argument.

PARKE, B.—The defendant only admits that the handwriting is his handwriting.

Rule refused.

HEMP v. WARREN.

A defendant who has been served with a writ of summons, after the expiration of four months, from its date, should apply to the Court to set it aside, and not treat it as a nullity.

IN this case, the writ of summons bore date the 6th day of August, and a copy was served on the defendant at half-past twelve o'clock, P. M., on the 6th of December. Two days afterwards a summons was taken out, calling on the plaintiff to shew cause why the copy of the writ of summons, and the service thereof, should not be set aside, on the ground that it had not been served within four calendar months, as required by the 2 Wm. 4, c. 39, s. 10 (a). The summons was heard before Rolfe, B., who

Fortescue shewed cause. There was no necessity for the defendant to apply to the Court, since the writ having become a nullity by efflux of time, the plaintiff would proceed at his peril. [Lord *Abinger*, C. B.—The fact of the writ being void does not preclude the defendant from moving the Court, if he thinks proper.] That is so where the nullity is not apparent on the face of the instrument, but here, the writ bears the memorandum directed by the statute, and which requires the service to be effected within four calendar months, including the day of the date.

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Martin, in support of the rule. To refuse the defendant who has been served with a void writ, the privilege of coming to the Court to set it aside, would be productive of hardship and injustice, for the plaintiff would, upon affidavit of the service of the writ, enter an appearance, and proceed with the action. If the defendant then applied to the Court, he might be met with the objection that the application was too late, as a further step had been taken in the cause.

PER CURIAM (*a*).—This is the very case in which a defendant ought to come to the Court.

Rule absolute.

(*a*) Lord ABINGER, C. B., PARKE, GURNEY, and ROLFE, B's.



COCKS and Others v. BREWER and ELIZABETH his Wife.

DEBT against Llewellyn Brewer and Elizabeth his wife. Debt against husband and wife on a judgment recovered
 The declaration stated that, whereas the plaintiffs, here-
 against the wife, *dum sola*: Plea, *nul tiel record*. Upon production of the record, it appeared, that the judgment was recovered against the wife and others: *Held*, no variance, but only ground for plea in abatement.

Upon an issue of *nul tiel record*, if the defendant takes an objection on the record being produced, he is entitled to reply.

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tofore, to wit, on, &c., by the consideration and judgment of the Court of Exchequer, had recovered against the said Elizabeth, by the name of Elizabeth Rogers, 1532L 9s. 6d., which, in and by the said Court were adjudged to the plaintiffs for their damages, which they had sustained by reason of the non-performance, by the said Elizabeth, of certain promises made by her to the plaintiffs, as for their costs, &c., as by the record and proceedings thereof, remaining in the said Court of our Lady the Queen before the Barons of her Exchequer more fully appears, which said promises were so made by the said Elizabeth when she was sole and unmarried.

Plea, nul tiel record. The replication traversed the allegation contained in the plea.

The record being produced in Court, it appeared that the original action had been brought against Elizabeth Rogers and Others.

E. V. Williams having moved for judgment,

Whateley shewed cause. Upon the issue raised, the defendants are entitled to judgment, there being a variance between the record produced and that set out in the declaration. In *Comyn's Dig.* tit. "Record" (C.), it is said "If a man pleads nul tiel record, and there being a material

claration stated that in Trinity Term, 1787, the plaintiff recovered, by a judgment, 42*l.* 1*s.* 0*d.* for his costs in the defence of an action brought by the defendant against him, the said plaintiff. Plea, nul tiel record. It appeared that the judgment on which the plaintiff declared, was recovered in Easter Term, 1788, and was recovered in an action brought by the defendant against the present plaintiff and one Avarne; and on both those grounds, but chiefly on the last, the Court gave judgment for the defendant. [*Parke*, B.—In that case there was clearly a variance, as the costs were adjudged to the plaintiff and Avarne, and were, therefore, a debt due to both]. *Few v. Backhouse* (a) is an authority to shew that this variance is material. In *Stoddart v. Palmer* (b), *Abbott*, C. J., says, “If the allegation, that the plaintiff, by judgment recovered, &c., be an allegation of substance only, it was sufficient to prove any judgment to warrant the writ. If, on the other hand, it be an allegation of description, it was necessary to prove a judgment corresponding in time, and in all other circumstances with that stated in the declaration.” Where a declaration for an escape alleged that one S. S. was arrested and gave bail, and that afterwards, bail above was put in before a Judge at Chambers, “as appears by the record of the recognizance;” it was held that the plaintiff was bound to prove that bail above was put in as alleged, *Bevan v. Jones* (c). So where in a case against a sheriff for removing goods seized under a *fi. fa.* without satisfying the landlord’s rent, the declaration alleged that the *fi. fa.* issued out of the King’s Bench, and the writ produced in evidence appeared to have issued out of the Common Pleas, it was held to be a variance, *Sheldon v. Whitaker* (d).

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E. V. Williams, contra. There is no variance. The allegation is matter of substance, not of description, nor is it

(a) 8 Adol. & E. 789.

(b) 3 B. & C. 2.

(c) 4 B. & C. 403.

(d) 4 B. & C. 657.

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rendered material by the averment "prout patet per recordum." *Purcell v. Macnamara* (a), which would seem to establish a contrary doctrine has been expressly overruled by *Stoddart v. Palmer*. Where there is a promise by a defendant and others, it is not less the promise of the defendant, because it is made jointly with the others. [*Parke, B.*—The question is, whether there is any difference between a debt created by record, and one created by bond? Scire facias on a recognizance of bail, must be against all the parties, or it is dismissable, *Rex v. Young* (b)]. That proceeds on the technical ground that a scire facias being in the nature of an execution, must pursue the judgment. In *Rice v. Shute* (c), it was held that a plaintiff was improperly nonsuited, because he had omitted to join one of several partners. *Rastall v. Straton* proceeded on the ground of variance, but subsequent cases shew that the reason why it is fatal to omit one of several plaintiffs is, that the party suing must be presumed to know his own partners, although he might not know the names of the contractors, *Snellgrove v. Hunt* (d), *Richards v. Heather* (e), *Mountstephen v. Brooke* (f). In *Broadbent v. Ledward*, (g), *Patteson, J.*, says, "The rule, as to the consequence of the non-joinder of parties as plaintiffs in actions founded upon contract, is not satisfactory in principle, and ought not to be extended. [*Parke, B.*—*Blackwell v. Ashton* (h) was the case of a scire facias

Whateley rose to reply, upon which *Williams* objected, that the plaintiffs having moved for judgment, was entitled to be heard last, to which it was answered that the defendants had begun by taking an objection to the record produced.

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PER CURIAM.—The present proceedings are analogous to a trial at nisi prius, when the defendant begins by taking an objection.

Whateley then replied.

PARKE, B.—*Rastall v. Straton* has nothing to do with the present case. There, the plaintiff sued on a judgment for the costs in an action alleged to have been brought against him by the defendant, while the record, when produced, shewed that those costs were not due to the plaintiff only. It was, in fact, a claim by one for a debt due to two.

Cur. adv. vult.

LORD ABINGER, C. B., on a subsequent day said, that the Court were of opinion that the distinction taken in argument between proceedings by scire facias and others, viz., that a scire facias was, for some purposes, a mere continuation of an original action, seemed to be a sound one. That there was no substantial distinction between the present and the ordinary case of an action on a contract, the judgment being the foundation of the duty, and, consequently, that the absence of the other contractors was, at most, only the ground for a plea in abatement. Judgment must, therefore, be entered for plaintiff.

Judgment for Plaintiff.



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EDE v. COLLINGRIDGE.

A plaintiff who holds a defendant to bail under the 1 & 2 Vict. c. 110, should proceed with the action, notwithstanding he has taken an assignment of the bail-bond, by reason of the bail above not having been put in in due time.

Semble, that the rule, H. T., 7 Wm. 4, is rendered of no effect, by the 1 & 2 Vict. c. 110.

THIS action was commenced by writ of summons, bearing date the 15th of November, 1842. On the 22nd of November, the defendant was arrested, by virtue of a *capias*, issued under the 1 & 2 Vict. c. 110, and having given bail to the sheriff, was forthwith discharged out of custody. The sheriff was ruled to bring in the body, and bail above not having been perfected in due time, the plaintiff took an assignment of the bail-bond, and on the 12th of December commenced an action upon it. No further step was taken against the defendant, and on the 12th of January, 1843, he put in bail above.

Watson moved for a rule, calling on the plaintiff to shew cause why, on payment of costs, all proceedings in the action on the bail-bond should not be stayed, and the bail-bond delivered up to be cancelled. The question is, whether, under the circumstances, the bail-bond is to be considered as a security? Bail taken under the 1 & 2 Vict. c. 110, s. 4, bears no analogy to bail under the old practice, but is a mere collateral proceeding in the action. Even under the old practice, the bail-bond was not enforced after bail above was put in, unless the plaintiff had lost a trial, or was

ing proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits."

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LORD ABINGER, C. B.—The fact of bail not having been put in in due time, did not prevent the plaintiff from proceeding with the original action, and we think that he ought to have done so. The only object of the *capias*, under the 1 & 2 Vict. c. 110, was to afford the plaintiff a security for his debt, in the event of the defendant leaving the country. The rule will be absolute, on payment of all the plaintiff's costs, to be taxed as between attorney and client, the defendant to plead issuably and take short notice of trial.

PARKE, B.—The plaintiff was not bound to stay proceedings in the original action, because he had commenced an action on the bail-bond; such must, in future, be understood to be the practice. Then the only question is, as to the terms upon which the bail are to be exonerated, and we think the plaintiff ought to be placed in the same position he would have been, if bail above had been put in in due time.

ALDERSON, B.—The oldailable process differed materially from the *capias* under the statute of Victoria. The former was an actual process to bring the defendant into Court, and without which he was not there at all; the latter is merely a collateral proceeding, by which the bail undertake to pay the debt or render the defendant. The plaintiff has two modes of recovering his money, and he has no right to set up a delay in putting in bail above, as a reason for not proceeding in the original action.

Rule absolute accordingly.



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LEDGARD v. THOMPSON.

A cognovit contained two attestations, first, "Witness, J. B.," secondly, "Signed in the presence of me, the undersigned, and I hereby certify and declare, that I am the attorney of the said W. P., and that I attended at his request, to inform him of this cognovit, and that I have informed him of the nature and effect hereof, and I hereby subscribe my name as his attorney, R. R.:" *Held*, that the second attestation was sufficient, and was not invalidated by the first.

PASHLEY moved to set aside a cognovit, on the ground that it was, not attested in the manner required by the 1 & 2 Vict. c. 110, s. 9. There were two attestations to the defendant's signature. The first was: "Witness, J. Bryant, of —, attorney at law." The second was as follows: "Signed, in the presence of me, the undersigned, and I hereby certify and declare, that I am the attorney of the said William Thompson, and that I attended at his request, to inform him of this cognovit, and that I have informed him of the nature and effect hereof, and I hereby subscribe my name as his attorney, R. Rowdy." The first attestation is clearly insufficient, and the second (assuming it might be valid if it stood alone), is so connected with the first as to create an ambiguity, inasmuch as the word "signed," may refer either to the signature of the defendant, or of the witness Bryant. The attesting witness must expressly declare on the face of the instrument that he subscribes his name as a witness to its due execution, *Potter v. Nicholson (a)*; but the present attestation does not necessarily refer to the execution of this cognovit.

PARKE, B.—The defendant does not seek to set aside

son who read the entire document would entertain any doubt that the word "signed," was intended to refer to it. In construing attestations to instruments of this nature, we must not reject common sense altogether, or by a too strict construction increase the hardships to which plaintiffs are in many cases subjected. If then, the second attestation be good upon the face of it, the defendant must go the length of contending that it is invalidated by the first, and that if a mistake is made in an attestation once written, it is not competent for a party to remedy the defect by re-attesting the instrument. That is a position which could not for one moment be supported, and we ought not, therefore, to interfere with this *cognovit*.

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GURNEY, B., concurred.

Rule refused.

FOWLER v. CHURCHILL.

IN this case, an order absolute was made, charging the dividends payable to Elizabeth Churchill, for her sole use and benefit, and accruing due from the sum of 5000*l*. government stock, standing in the books of the Bank of England, in the names of trustees (*a*). The Bank of England, in consequence, refused to pay the dividends to the trustees, upon which they commenced an action against the Bank for the recovery of the same.

Notwithstanding an order absolute, under the 1 & 2 Vict. c. 110, ss. 14, 15, charging stock in the names of trustees, the Bank of England is bound to pay the dividend to the trustees, who are liable in equity, for its proper distribution.

The Attorney General now moved for a rule to shew cause why all proceedings in the action should not be stayed upon payment of a portion of the dividends, notice thereof being first given to the judgment creditor.—The Bank is placed in a situation of great difficulty. On the one hand, the judgment creditor contends that the Judge's order binds the Bank, and renders it compulsory on them to pay the dividends to him. On the other hand, the

(a) See the case, *ante*, p. 562.

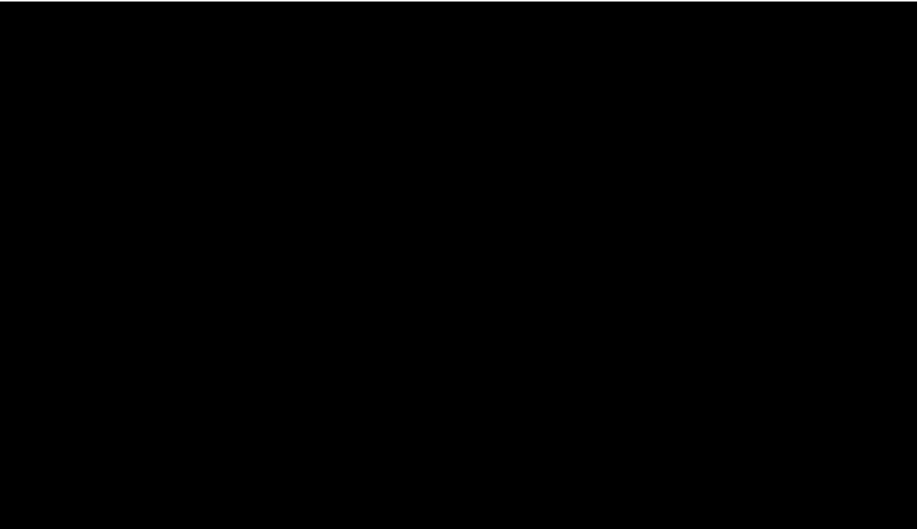
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trustees insist upon the dividends being paid to them. The Bank has no interest in the matter, and is willing to pay into Court, or to the parties entitled, the whole or such portion of the dividends as the Court shall direct.

LORD ABINGER, C. B.—There appears to be no ground for granting a rule. When the Judge's order is made absolute, the executors are chargeable with the proper distribution of the money, and the Bank is bound to pay it over to them. It would be impossible for the Bank to carry on its business, if we were to hold it bound to see the proper appropriation of the money under every order charging stock.

PARKE, B.—I am of the same opinion. As soon as the Judge's order is absolute, the executors are liable in the same manner as if the dividends had been charged by deed.

ALDERSON, B.—When an order is made nisi, the Bank ought to hold its hand, and when the order is made absolute, it is in the nature of a charge upon the fund. The Bank is then to pay the money to the trustees, who are bound to see that it is properly applied. The Bank has nothing to do with the distribution of the fund, and is not



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PEARSON v. ARCHBOLD.

SIR JOHN BAYLEY moved for a rule, calling on the plaintiff to shew cause why he should not pay a sum of money found due under an award. The case had been referred by order of *Nisi Prius*, the costs to abide the event. The order was made a rule of Court, and the arbitrator, by his award, directed the plaintiff to pay to the defendant, 16*l.*, with the costs, which were afterwards taxed at 38*l.* The defendant having refused to pay, the present application was made, for the purpose of issuing execution under the 1 & 2 Vict. c. 110, s. 18. It did not appear from the affidavits that the defendant had been served with a copy of the award and allocatur.

A motion (under the 1 & 2 Vict. c. 110, s. 18,) calling on a party to pay money and costs, found due by an award, should be made upon affidavit of service of a copy of the award and allocatur.

Lord ABINGER, C. B.—There should be an affidavit of the service of a copy of the award and allocatur.

Application withdrawn.

M'GREGOR v. GREGORY.

LIBEL. The declaration, after the usual inducement of good character, stated, that whereas before, and at the time of the committing of the grievance by the defendant, as thereafter mentioned, the defendant used the words

A declaration for libel, stated, that at the time of committing the grievance, the defendant used the words

"black sheep," meaning a person of stained and sullied reputation, and that the defendant used the words "black legs," meaning a person guilty of cheating and defrauding; it then stated, that the defendant published of the plaintiff the following libel, "black sheep, (meaning thereby, that the plaintiff was a black sheep, in the sense in which the word was so used as aforesaid,") or "sharps and flats," and then set forth a paragraph, which contained nothing in itself libellous. The defendant pleaded as to publication of part of the libel, to wit, "black sheep," that the word was not used in the sense alleged; there was a similar plea to the words "black legs."

Held, first, on special demurrer, that the libel was divisible, and that the defendant might plead separately to each part.

Secondly, that the inducement explaining the sense in which the words were used, was necessary.

Thirdly, That the plea did not amount to not guilty.

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"black sheep," for the purpose of expressing and meaning, and the said word so used by him was, by divers, to wit, all the persons to whom the libel thereafter mentioned was published, understood as expressing and meaning a person notorious by reason of bad character, and of stained and sullied reputation; and the defendant then also used the words "black legs," for the purpose of expressing and meaning, and the said last-mentioned words so used by him was, by divers persons, to wit, all the persons to whom the libel thereafter mentioned was published, understood as expressing and meaning a person guilty of cheating and defrauding others, yet the defendant intending to cause it to be suspected and believed that plaintiff had conducted himself dishonestly, fraudulently, and improperly, on, &c., in a certain newspaper, called the *Satirist*, or *Censor of the Times*, falsely and maliciously did publish, and cause and procure to be published, of and concerning the plaintiff, a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, that is to say, "black sheep," (meaning thereby, that the plaintiff was a "black sheep" in the sense and meaning in which that word was so used by the defendant, as aforesaid); and "black legs," (meaning thereby that the plaintiff was a black leg in the sense and

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for the purpose of expressing or meaning, nor were the same words, when used by him, by the said persons in the declaration mentioned, or any of them, understood as expressing or meaning a person notorious by reason of bad character, and of stained and sullied reputation, in manner and form as in the declaration alleged: concluding to the country. Thirdly, as to the publishing, and causing and procuring to be published, the following part of the said supposed libel, that is to say, "black legs," that before or at the time of the committing of the supposed grievance, he, the defendant, did not use the said words "black legs" for the purpose of expressing or meaning, nor were the said words when used by him by the same persons in that behalf mentioned, or by any of them, understood as expressing or meaning a person guilty of cheating and defrauding others, in manner and form as in the declaration alleged: concluding to the country. There was a fourth plea, justifying a portion of the statement, which was not in itself libellous. To each of these last three pleas, the plaintiff demurred separately, assigning to the first, the following special causes: that the plea contained matter in answer only to part of the libel, and the part by the plea selected for such answer, was not divisible from the rest of the libel; that the defendant was not entitled to select only part of such a libel as that stated in the declaration, for the purpose of a defence thereto; that the plea, though in its commencement it professed to be an answer to part of the said causes of action, afterwards stated matter amounting to a defence to the whole of those causes; that the said plea ought to have been pleaded to the inducement in the declaration as to the said words "black sheep," and not to the publishing of the part of the libel in respect of those words; that the plea amounted to the plea of not guilty, either to the whole, or else to the part of the declaration mentioned in it; and that it was an argumentative traverse of the defendant's being guilty of the grievance in the plea mentioned. Similar causes were assigned to the second

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demurrer, the words "black legs," only being substituted for "black sheep." To the third demurrer, special causes were also assigned, but this plea was abandoned on the argument.

Martin, in support of the demurrer. The first objection is, that the plea is pleaded to part of the libel, which is one undivided proposition. [*Parke*, B.—The Court of Common Pleas have decided that you may so plead (*a*). I always felt a difficulty about it.] Such a plea is defective in not confessing the libel complained of. [*Alderson*, B.—Suppose the libel charges two distinct acts of cheating, might not the defendant justify one of them?] That might be so where the libel consists of separate and distinct imputations, but here the parts to which the second and third pleas are pleaded form one indivisible matter, namely, that the plaintiff was a person of stained and sullied reputation. In *Clarkson v. Lawson*, the libel included separate and distinct matters, viz., that the defendant had been thrice suspended from his office of proctor. Considerable doubt has, however, been thrown upon that decision by the case of *Mountney v. Watton* (*b*), in which it was held that a plea justifying all parts of the libel, except the heading of the paragraph, was bad. That case has been confirmed by *Roberts v. Brown* (*c*). The second objection is, that the

office of the innuendo, and, consequently, it would not be admitted by the plea of not guilty, *Bennion v. Davison* (a). The plea is only an argumentative traverse of the libel alleged.

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Hugh Hill, contra. *Mountney v. Watton* is an authority in favor of the pleas. There the libellous matter was headed "horse stealer," and the concluding innuendo was, that the defendant, "then and there, by the said libellous matter, intended and meant that the plaintiff had been, and was guilty of feloniously stealing a horse;" the plea was not pleaded to the heading, which was the gist of the libel, but was confined to facts of suspicion, and, therefore, held bad. Suppose a man has been convicted of a crime, and that is imputed to him, together with some other offence which is unfounded, is he to recover damages for the whole? [*Alderson*, B.—It must follow either that the fact may be given in evidence in mitigation of damages, or it may be pleaded]. It could not be given in evidence in mitigation of damages, *Jones v. Stevens* (b). *Clarkson v. Lawson* is an express authority that part of a libel may be pleaded to. In *Cooper v. Lawson* (c) the particular question was not before the Court. In *Clarke v. Taylor* (d), *Tindal*, C. J., says, "There can be no doubt that a defendant may justify part only of a libel containing several distinct charges. But if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has so omitted to justify." Here the words "black sheep" and "black legs," convey separate and distinct imputations. As to the objection that the plea should have been pleaded to the inducement, *Angle v. Alexander* (e), *Goldstein v. Foss* (f), *Hearne v. Stowell* (g), shew that the proper mode of explaining the meaning of the words is by an introductory allegation. The

(a) 3 M. & W. 179.

(b) 11 Price, 235.

(c) 8 Ad. & El. 746; S. C. 1 P. & D. 15.

(d) 2 Bing. N. C. 654. S. C. 3 Scott, 95.

(e) 7 Bing. 119; S. C. 4 M. & P. 870.

(f) 6 B. & C. 154; S. C. 9 D. & R. 197.

(g) 12 Ad. & El. 719; S. C. 4 P. & D. 696.

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plea then is directed to so much of the libel as the matter of inducement is intended to support. The inducement being necessary to explain, the libel would have been admitted under the plea of not guilty.

Cur. adv. vult.

PARKE, B., delivered the judgment of the Court. [After stating declaration and pleas, his Lordship proceeded]. The objections to the first special plea are three ; first, that it was pleaded to part of the libel, which, it is insisted, is bad pleading ; secondly, that it is not pleaded, as it ought to have been, to the inducement ; thirdly, that it is an argumentative plea of not guilty as to part of the declaration. We think none of these objections ought to prevail. As to the first, we consider it to be settled that there may be a plea to a part of a libel, which is separable from the rest, as the part pleaded to in this case certainly is, for a plea of justification as to this part, and not guilty as to the remainder, would not be inconsistent, a part may be true, and the remainder excused by the occasion of the publication. The power of pleading to part was defined by the Court in the cases of *Stiles v. Nokes (a)*, and *Clarkson v. Lawson*, in which it was decided that it was competent for the defendant to adopt such a course when the libellous matter was divisible.

ducement, if properly pleaded, as we must assume it for this purpose, and this branch of the argument to be, was necessary to maintain the action. 'The cause of action, as to part of the libel, was the publication of that part, and the corresponding part of the inducement was necessary to the maintenance of the action. The defendant, in his plea, then says as to so much of the cause of action as consists in publishing that part of the libel respecting the plaintiff, that he was a "black sheep," the inducement is not true, and, therefore, the cause of action, pro tanto, fails. This appears to us to be so. The third objection is, the inducement in this case is not properly matter of inducement, and that the plea really amounts to the general issue. It is said that the proper office of an inducement or introductory averment is to state facts, by reference to which the libel will be made intelligible, but that the meaning of the words in the abstract, and without reference to facts, is not properly the subject of an introductory averment, and upon this part of the case we have had some doubt. It is laid down in several authorities, that the Court is to inform itself of the meaning of English words, although unusual, and peculiar to a particular county, *Comyns's Digest*, tit. "*Action on the Case for Defamation*," (G.) A strong instance of which is the insertion of the words "healer of felons," without an averment as to the local use of the term, *Roll's Abr.* 86, pl. 1. 5. Such is the rule, also, with respect to Welsh words, *Hobart*, 126. We certainly should have doubted much on this part of the case, if it had not been for the case of *Angle v. Alexander*, in the Exchequer Chamber, in the analogous case of slander. That case decides, that a distinct averment of the meaning of particular English words, which have acquired some sense different from their natural one, was necessary, and that an innuendo without such an averment was insufficient. On the authority of that case, which, obviously, the pleader had in view, in framing this declaration, it is clear that the averment of the meaning of the term "black sheep," was properly introduced by way

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of inducement; consequently, the plea does not amount to not guilty. Under the new rules, the inducement, when properly pleaded, must be traversed, if it is intended to be denied. Not guilty, puts in issue only the publication of the libel maliciously, and in the sense imputed by the innuendo. We think, therefore, the first special plea is good; the second special plea is in effect the same; and there will, consequently, be judgment for the defendant on the second and third pleas, and for the plaintiff on the fourth.

Martin then applied for and obtained leave to amend, on payment of costs, as between attorney and client.

Rule accordingly.

WALKER v. GOLLING.

A feme sole plaintiff, who marries before final judgment, may sue out execution, without making her husband a

THIS was a rule calling on the plaintiff to shew cause why the writ of fieri facias issued in this cause and all subsequent proceedings should not be set aside, on the ground that the plaintiff had married before final judgment, and her husband had not been made a party to the record

judgment be recovered against her, and she marry before execution, a scire facias must be brought by or against husband and wife in order to execute a judgment. Where a feme sole marries after interlocutory judgment against her, the plaintiff may proceed to final judgment and execution, without joining the husband by scire facias, and a capias ad satisfaciendum against her, following the judgment, is regular, though the plaintiff had notice of the marriage, *Cooper v. Hunchin* (a). So where an action of ejectment was brought against a feme sole, and she married before trial and verdict, judgment was afterwards entered up against her by her original name; it was held regular to issue an habere facias possessionem and fieri facias against her by the same name, though the fieri facias was imperative. *Doe dem. Taggart v. Butcher* (b).

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F. V. Lee, contra. The rule with respect to a scire facias upon a change of parties, is, that where a new person is to be benefited or charged with the execution of a judgment, there ought to be a scire facias to make him a party to the judgment; but where the execution is not beneficial or chargeable to a person who was not a party to the judgment, a scire facias is unnecessary, *Penoyer v. Brace* (c). In this case, the execution would be beneficial to the husband, as he would be entitled to the proceeds, when recovered. In *Tidd's Practice* (d) it is said, if a feme sole obtain judgment, and she afterwards marry before execution, there must be a scire facias for husband and wife, in order to have execution of the judgment. And in a modern case, *Wortley v. Rayner* (e), it was holden, that the husband cannot have execution for costs on a plea of coverture found for his wife, sued as a feme sole, without a scire facias, it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process without a

(a) 4 East, 521.

319.

(b) 3 M. & Sel. 557.

(d) p. 1114.

(c) 1 Ld. Raym. 244; 1 Salk.

(e) 2 Doug. 637.

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scire facias. He also referred to *Woodger v. Gresham*, *Morgan v. Painter* (b), and *M'Neillage v. Holloway* (c)

PARKER, B.—The form of a scire facias by husband, after reciting that the wife recovered a judgment, goes on to state, that afterwards she intermarried (it would seem from that, (though it is by no means concluded that a scire facias is only requisite when the marriage takes place after final judgment; and that where the marriage takes place before final judgment, the objection may be taken by plea. No authority has been adduced in support of the application, and therefore the Court are not disposed to interfere.

Lord ABERDEEN, C. B., GURNEY, and ROLFE, B., concurred.

Rule discharged.

(a) 1 Salk. 116.

(b) 6 T. R. 265.

(c) 1 B. & Ald. 218.

(d) Tidd's Forms, 491.

ATKINSON and Another v. DAVIES.

ASSUMPSIT by payee against maker of a promissory note. Plea, that one Thomas Davies, the brother of the plaintiff, now deceased, in his lifetime, and continued to and at the time of his death, was indebted to the plaintiff in a large sum of money, to wit, the amount in the promissory note specified, and that after the death, and before the interment, of the said T. Davies, to wit, of the plaintiff Atkinson, by a threat and representation, the Court cannot give judgment, non obstante veredicto, or arrest the judgment, but the course is to award a repender.

To assumpsit by payee against maker of a promissory note, the defendant pleaded, that the plaintiff, by a threat, that he would prevent the funeral of the plaintiff's brother, procured the note from the defendant, and that there never was any consideration for the note, and that the plaintiff did not, by a threat that he would prevent the funeral of the plaintiff's brother, procure the note, modo et formâ: Held, an answer to the whole.

unless the defendant would make and deliver the said promissory note to the plaintiffs, the plaintiffs could and would prevent the funeral of the said T. Davies, the defendant's brother, from taking place, obtained and procured from the defendant the delivery of the said promissory note, and the defendant then made and delivered the same to the plaintiffs, upon such threat and representation, and for no other cause whatever: and the defendant further saith, that there never was any consideration for the making and delivery of the said promissory note, and that the defendant never as executor or administrator of the said T. Davies, deceased, nor ever had intermeddled with, nor had he then any of his estate or effects, nor was he liable to be sued in respect of any debt or debts of the said T. Davies, deceased, and that the plaintiffs had always held, and then sold, the said promissory note, without any value or consideration. Verification.

Replication, that Atkinson did not, by a threat and representation, that unless the defendant would make and deliver the said promissory note, the plaintiffs could and would prevent the funeral of the said T. Davies from taking place, obtain or procure from the defendant the making of the said promissory note, modo et formâ.

The case was tried at the last Bristol Assizes, when a verdict was found for the plaintiffs.

Butt had obtained a rule nisi for judgment non obstante dicto, or to arrest the judgment, on the ground that the replication not having traversed that part of the plea which alleged that there was no consideration for the making of the note, such allegation must be taken as admitted on the record.

J. Addison shewed cause. The plea contains no allegation that the note was given on account of the debt due from the defendant's brother, and therefore the averment

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scire facias. He also referred to *Woodyer v. Graham* (a), *Morgan v. Painter* (b), and *M'Neilage v. Holloway* (c).

PARKE, B.—The form of a scire facias by husband and wife, after reciting that the wife recovered a judgment, goes on to state, that afterwards she intermarried (d). It would seem from that, (though it is by no means conclusive,) that a scire facias is only requisite when the marriage takes place after final judgment; and that where the marriage takes place before final judgment, the objection must be taken by plea. No authority has been adduced by the defendant in support of the application, and therefore we are not disposed to interfere.

Lord ABINGER, C. B., GURNEY, and ROLFE, B.'s, concurred.

Rule discharged.

(a) 1 Salk. 116.

(b) 6 T. R. 265.

(c) 1 B. & Ald. 218.

(d) Tidd's Forms, 491.

ATKINSON and Another v. DAVIES.

Judgment, non ASSUMPSIT by payee against maker of a promissory

unless the defendant would make and deliver the said promissory note to the plaintiffs, the plaintiffs could and would prevent the funeral of the said T. Davies, the defendant's brother, from taking place, obtained and procured from the defendant the delivery of the said promissory note, and the defendant then made and delivered the same to the plaintiffs, upon such threat and representation, and for no other cause whatever: and the defendant further saith, that there never was any consideration for the making and delivery of the said promissory note, and that the defendant never was executor or administrator of the said T. Davies, deceased, nor ever had intermeddled with, nor had he then any of his estate or effects, nor was he liable to be sued in respect of any debt or debts of the said T. Davies, deceased, and that the plaintiffs had always held, and then held, the said promissory note, without any value or consideration. Verification.

Replication, that Atkinson did not, by a threat and representation, that unless the defendant would make and deliver the said promissory note, the plaintiffs could and would prevent the funeral of the said T. Davies from taking place, obtain or procure from the defendant the making of the said promissory note, modo et formâ.

The case was tried at the last Bristol Assizes, when a verdict was found for the plaintiffs.

Butt had obtained a rule nisi for judgment non obstante veredicto, or to arrest the judgment, on the ground that the replication not having traversed that part of the plea which alleged that there was no consideration for the making of the note, such allegation must be taken as admitted on the record.

J. Addison shewed cause. The plea contains no allegation that the note was given on account of the debt due from the defendant's brother, and therefore the averment

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that the defendant was not executor, nor intermeddled with the assets of the deceased, is immaterial. , The substantial part of the plea is, that the note was obtained by a threat to stop the funeral of the defendant's brother, and that allegation is traversed by the replication. The plea contains a special statement of facts, which shew that there was no consideration for the note. A general plea of no consideration, would have been bad on demurrer, *Stoughton v. Earl of Kilmorey (a)*, and the argument on the other side amounts to this, that though the plaintiffs might have demurred, if the facts had not been set forth, yet, if they are set forth, and he traverses them, the issue is immaterial. If the traverse had been extended, the issue would nevertheless have been confined to the special facts, so that there can be no admission by not traversing that, which if traversed, would have been no part of the issue. The construction attempted to be put on this plea would render it double and inconsistent.

Butt, in support of the rule. Assuming the plea be double, the defendant is entitled to judgment, because sufficient is left unanswered to shew that the plaintiffs have no cause of action. If the averment "that there never was any consideration for the making or delivery of the said promissory note," had stood alone, and issue had been

issue, or by a special demurrer. But assuming the plea not to be double, still the material part is that which denies the existence of any consideration, for, supposing the immediate cause of giving the note was the threat alleged, yet, if there was any consideration, as, for instance, if it were founded on an antecedent debt, the note would be good. Such a state of facts is not inconsistent with the allegation traversed. *Rand v. Vaughan* (a), is an authority in support of this application.

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PARKE, B., delivered the judgment of the Court. A rule nisi was obtained, in this case, to arrest the judgment, on the ground that the replication, which put in issue part of the plea only, admitted the residue to be true, and that such residue was an answer to the plaintiff's demand. After argument and careful consideration of the pleadings, we are of opinion that that replication was a good answer to the whole plea, and, therefore, the rule must be discharged. [His Lordship then read the pleadings]. It will be observed, upon these pleadings, that the statement of the debt being due from the defendant's brother, is in no way connected with the giving of the note. The note is not said to have been given by way of payment or satisfaction for it, and that statement, therefore, as well as the one which relates to it, that the defendant was not executor of his brother, nor liable for his debts, must be rejected. The part of the plea which remains, and is alone to be answered, is, that the note was given by reason of a threat to stop the funeral, and not for any consideration, and the question is, whether the replication answers the material allegation of the plea, by denying that the note was given by reason of the threat? Under the new pleading rule, it is not enough to state that the note or bill was given without

(a) 1 Bing. N. C. 767; S. C. 1 Scott, 670.

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a consideration, but the cause of the making or drawing must be stated affirmatively, as, for instance, that it was made for the accommodation of another. That is laid down by Lord Abinger, in *Stoughton v. Earl of Kilmorey*. This plea, therefore, would have been bad on special demurrer, if it had stated merely that there was no consideration; the affirmative statement, that the note was given in consequence of a threat alone, makes the plea good, and, consequently, that allegation is material, and the traverse of it is an answer to the whole plea. In like manner, in the case of an averment in a plea, stating a note to have been given for the plaintiff's accommodation, and without any consideration, the traverse of the note being given for accommodation, would dispose of the whole plea. The rule to arrest the judgment must therefore be discharged. We think it however, right to add, that if we had thought the replication was not an answer to the plea, it would not have followed that the judgment would have been arrested: the opinion of all the Judges in the case of *Gwynne v. Burnell(a)*, is, that judgment non obstante veredicto can be awarded only on pleading by the defendant in confession and avoidance, and not on an implied confession contained in a rejoinder of a part of the replication which it does not answer. This seems to lead us to the conclusion that the judgment for the plaintiffs cannot be arrested on the ground

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WINDHAM v. FENWICK.

BARSTOW moved to set aside an alias writ of summons, on the ground of variance. The original writ described the defendant "as of —, in the County of York," but an application having been made at Chambers to amend the writ, by inserting the word Waghén, *Parke*, B., made an order accordingly. The alias writ described the defendant as of "Newport, in the Isle of Wight, in the county of Southampton, and late of Waghén, in the county of York." It was sworn that the defendant never did live in the county of York.

A writ of summons described the defendant as of W., in the county of York. The alias writ described him as of N., in the county of Southampton, and late of W., in the county of York. The Court refused to set aside the latter writ on affidavit, that the defendant never lived at York.

PARKE, B.—The discrepancy is immaterial, it is enough if he was supposed to have lived in that county.

Rule refused.

 GEORGE v. CHAMBERS, REES and Others.

DECLARATION in replevin for taking the plaintiff's goods and chattels.

Plea, by defendant Chambers, that after the passing of the 5 & 6 Wm. 4, c. 50, (the Highway Act,) the plaintiff was the surveyor of certain turnpike roads in the parish of Pembrey, which were highways; that one Howells, who was a resident and inhabitant in the said parish, informed the defendant Rees, on oath, that part of the said turnpike roads was not sufficiently repaired; that the defendant summoned the plaintiff to appear at a special sessions, that the plaintiff did not appear, that the justices appointed one Thomas to view the roads, and report to the justices at a special sessions, that at the special sessions held before the defendants on the 13th of November, 1841, in the presence

Replevin will lie for a distress levied under a warrant of justices.

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of the plaintiff, Howells reported that the road was not in effectual repair. Whereupon the defendants made an order, dated &c., whereby they directed the plaintiff to repair the road within six weeks from the date of the order; that defendants after making such order, made another order, in pursuance of the statute, 18 Geo. 3, c. 19, intituled, "an act for the payment of costs to parties in complaints determined before justices of the peace, out of sessions," &c., against the plaintiff, for neglecting to repair the said high-roads, and thereby awarded 2*l.* 3*s.*, to be paid by the plaintiff to Howells; the plea then averred that the plaintiff did not pay or give security for the said sum, whereupon the defendants issued their warrant to the constables, to levy 2*l.* 3*s.*, by distress and sale of the plaintiff's goods, and delivered their warrant to the defendant B., then being constable, who took the plaintiff's goods and chattels as a distress for the said sum of 2*l.* 3*s.*, and kept and detained them for the cause aforesaid, until the plaintiff replevied the same. Demurrer.

E. V. Williams, in support of the demurrer argued, that the justices had no authority or jurisdiction to make the order mentioned in the plea. The Court being of that opinion, the question was raised, whether, under the circumstances, replevin would lie?

Weller (a), it is said by *Richardson, J.*, "that when a magistrate has competent jurisdiction, and adjudges, and on refusal to pay, issues a warrant of distress and sale, the goods taken under it are not replevisable." In *Bacon's Abr.* tit. "*Replevin*," (C), it is said "that where an act of Parliament orders a distress and sale of goods, this is in the nature of an execution, and replevin does not lie." In *Rex v. Monkhouse* (b), the Court granted an attachment against a sheriff, for granting a replevin of goods distrained on a conviction for deer stealing. *Selby v. Bardons* (c), was also cited.

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E. V. Williams, contra. There is no objection to the form of action. Goods taken in execution, cannot in one sense be replevied, because the Court would grant an attachment against the sheriff, but it does not, therefore, follow that replevin will not lie. When it is stated in the old books, that an action will not lie, the meaning is, that the remedy is altogether misconceived, as for instance, an action of trespass for an injury to the reversion. An action of debt may be said not to lie, after the debt is satisfied, nor an action of trespass, after a legal satisfaction of it; in the same way it may be said, replevin does not lie for a distress levied under an act of Parliament, for the adjudication of the justices is conclusive of the fact. Such examples shew that there is a distinction between an objection to the form of an action, and to its maintenance. If the proposition that replevin does not lie, means that the sheriff is liable to an attachment for granting it, then this is not one of the cases to which such proposition is applicable; on the other hand, assuming it to apply to this case, the sheriff having granted the replevin, the plaintiff has a legal ground of complaint, and there is no objection on the record. The earliest authority on the subject, is *Bradshaw's case*, (cited in *Bac. Abr.* tit. "*Replevin*," (C)),

(a) 1 B. & B. 57; S. C. 3
 Moore, 294.

(b) 2 Stra. 1184.
 (c) 3 B. & Ad. 2.

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in which it was ruled, that when an act of Parliament orders a distress and sale of goods, this is in the nature of an execution, and replevin does not lie, but if the sheriff grants one, it is not such a contempt as to warrant an attachment against him, and *Powell, J.*, said, he remembered a case in the Exchequer, where a distress was taken for a fee-farm rent due to the King, yet upon debate in the Court, no attachment was granted though it was the King's case. But now, in such cases, it would seem to be a contempt for a party to replevy, and the Court would grant an attachment against the sheriff, *Rex v. Burchet (a)*, *Rex v. Monkhouse (b)*, *Rex v. Oliver (c)*. In *Pearson v. Roberts (d)*, it was decided, that replevin to recover damages, is an action within the meaning of the 24 Geo. 2, c. 44, but in the subsequent case of *Fletcher v. Wilkins (e)*, the Court held, that the remedy by replevin was not affected by that statute. In *Buller's Nisi Prius (f)*, it is said, that replevin may be brought in any case where a man has had his goods taken from him by another, and the law is so laid down in *Com. Dig. tit. "Replevin," (A)*. The rule is thus stated in *Tidd's Practice (g)*, "where an act of Parliament orders a distress and sale of goods, as for a penalty after conviction on the Game Laws, or on the Highway Act, or for a fine imposed on an officer by commissioners of land-tax, or for the wages of labourers on the statute of 20 Geo. 2, c. 19, this is in

but it is an action founded upon any taking by the party. The language of the 43 Eliz. c. 2, shews, that the Legislature took it for granted that replevin would lie for a poor rate. The 19th section provides, "that if any action of trespass or other suit shall happen to be attempted and brought against any person for taking of any distress, &c., by authority of that act; the defendant may either plead not guilty, or make avowry, cognizance, or justification for the taking, alleging in such avowry, &c., that the distress whereof the plaintiff complained, was done by authority of that act." *Aylesbury v. Harvey* (a) is a case of replevin brought for a chattel taken under a justice's warrant of distress. Where a party brought replevin for goods levied under a warrant of distress for an assessment made by a special sessions under the Highway Act, 13 Geo. 3, c. 78, s. 47, on the ground of the premises for which he was assessed, being situated without the township, which was liable to repair the road, the Court refused to set aside the proceedings, *Fenton v. Boyle* (b). He also cited *Banks v. Brand* (c), *The Attorney General v. Brown* (d), *Morell v. Harvey* (e), *Morrell v. Martin* (f).

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LORD ABINGER, C. B.—It seems very probable, when the cases were decided in favour of the plaintiff in replevin, that this precise objection was never taken. The more you look back into the authorities, the less you find it. Therefore it is now too late to raise the question. The doubt only arises upon the statute, 24 Geo. 2, and it is said, that that statute applies to this case. But it has been decided, that the statute does not destroy the right or remedy existing before it passed, but only gave a certain protection. The statute of Elizabeth does not give an action of replevin, because it gives a form of plea, any more

(a) 3 Lev. 204.

(b) 2 New Rep. 399.

(c) 3 M. & Sel. 525.

(d) 1 Swanst. 265.

(e) 4 Ad. & E. 684; S. C. 6 N. & M. 35.

(f) 4 Scott N. R. 300; S. C. 3 M. & Gr. 581.

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than it gives an action of trespass, because it gives a form of plea. Mr. *Evans* contended, that an avowry under that statute, must be sustained by the statute itself, and therefore it gives replevin. The use made of the statute by Mr. *Williams*, was more legitimate, viz. that it recognises the right to bring replevin as well as trespass. It is not necessary to go into the case, or decide that replevin will not lie if goods are taken under a conviction which is valid. If the magistrate has no jurisdiction, either replevin or trespass may be maintained. Replevin has this advantage, that by such form of action, the party may obtain back his goods. In the case of an execution, the Court will not permit the sheriff to discharge its order, by granting a replevy of the goods: but where a warrant of distress issues, the money is first demanded, and if the party will not then pay, then a distress is levied on his goods. It is different with respect to an execution, because there, there is an order of the Court, that the sheriff shall levy the money, which shews, that in such case, the law never meant a replevin, for that would frustrate the object of the Court. But in the case of a distress, the party may try the jurisdiction of the justices to grant the warrant at all, and if so, why depart from the common law remedy, which is provided, not only to try the right, but in the mean time to have possession of the goods. I think, therefore,

law, applicable to all cases where goods are improperly taken. There must, therefore, be some strong authority to shew that replevin will not lie where goods are improperly taken under the warrant of a justice. After looking for authorities we find none such. It is true, that in some cases, the Court will interfere to prevent a replevy, because the process of the Court would otherwise be defeated. The rule is correctly stated in Chief Baron *Gilbert's* Treatise on Replevin (a), "If a superior Court award an execution, it seems, that no replevin lies for the goods taken by the sheriff, by virtue of the execution, and if any person should pretend to take out a replevin and execute it, the Court of justice would commit them for a contempt of their jurisdiction, because, by every execution, the goods are in the custody of the law, and the law ought to guard them; and it would be troubling the execution awarded, if the party, on whom the money was to be levied, should fetch back the goods by replevin; and, therefore, they construe such endeavours to be a contempt of their jurisdiction, and upon that account commit the offender; that is, if a person attempt to defeat the execution of the Court, they will treat it as a contempt, and punish it by attachment of the sheriff." But Chief Baron *Gilbert* also says, "that in cases in which there is no jurisdiction, the goods may be replevied." That I apprehend is a sufficient authority. All that we have to decide is, whether or no, the plea affords a good answer to the complaint, and if not, the defendants must stand in the situation of common and ordinary wrong doers. As to there being several cases in the Books, in which replevin has been brought, under similar circumstances to the present, and in which neither the counsel nor the Court adverted to the point, I do not attach much importance to that. But two of the authorities cited are certainly entitled to considerable weight, viz. that of *Fenton v. Boyle*, and the opinion of Lord *Redesdale*, in *Shannon v.*

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(a) p. 138.

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Shannon. It appears to me, therefore, that as the defendants admit, by their justification, that they seized the plaintiff's goods, we cannot say that replevin will not lie.

ALDERSON, B.—I am of the same opinion. It seems to me, that in the case of a distress under a magistrate's warrant, there may be ground for saying that matter may be pleaded in justification, but that does not show that replevin will not lie. The reasonable meaning of the cases cited, in which it is said, that replevin "will not lie," is, that there is matter which may be pleaded in answer. I agree that replevin will not lie, where there is a judgment of a superior Court, and for this, among other reasons, that if you replevy on the first judgment, you could replevy on the judgment on that judgment, and where would it stop? It is different with respect to an inferior jurisdiction.

Judgment for Plaintiff.

UNWIN and Another v. St. QUINTIN.

To trover by
 assignees of
 H. and L.,

TROVER by the plaintiffs as assignees of the estate and effects of G. Heathcote and W. Levesley, bankrupts, against

others; that the latter, on the 9th of August, 1842, sued out a fieri facias against the said G. H. and W. L., which was delivered to the defendant, as sheriff of Yorkshire, to be executed; that, thereupon, the sheriff, after the said G. H. and W. L. became bankrupts, as aforesaid, and before the issuing of the fiat, took in execution the bankrupt's goods, and, before the issuing of the fiat, levied the amount by sale, as, by the said writ, he was commanded; that afterwards a fiat issued against the said bankrupts, under which the plaintiffs were appointed assignees of the estate and effects of the said George Heathcote and William Levesley; that they accepted the said appointment, and, as assignees, became "entitled to the possession of the said goods and chattels, as and from the time when the said George Heathcote and William Levesley became and were bankrupt as aforesaid, which possession is the said possession of the plaintiffs as assignees in the declaration mentioned." The plea then averred that the fieri facias was bonâ fide executed and levied, that the goods were seized before the date and issuing of the fiat, and that the creditors had not, at the time of executing the writ, notice of any prior act of bankruptcy committed by the bankrupts; that the judgment was not founded on a warrant of attorney or cognovit, and that the seizing and taking of the goods under the writ, was the conversion in the declaration mentioned.

Demurrer, assigning for causes, amongst others, that the plea does not confess a sufficient colourable title in the plaintiffs to enable them to maintain their action, that it amounts to an argumentative denial that the plaintiffs, as such assignees at the time of the conversion, were possessed of or entitled to the said goods and chattels, or, at all events, a denial that they were possessed of or entitled to possession at the time of the conversion; also that it does not sufficiently confess and avoid the matters stated in the declaration, and also that it contains no averment that the said G. Heathcote and W. Levesley mentioned in the plea, were the same G. Heathcote and W. Levesley mentioned in the declaration.

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J. W. Smith, in support of the demurrer. The plea does not confess and avoid the allegation that the plaintiffs were possessed as of their own property, but amounts to an argumentative denial of that fact. In *Turquand v. Hawtrey* (a), the Court expressed an opinion that such a plea was bad on special demurrer.

Pashley, who was to have supported the plea, being absent,

The Court said,—The plea appears to us to be an argumentative traverse of the plaintiffs' possession at the time of the conversion. The plea does not give colour, but the right of the assignees is made to depend upon the relation of their title to the act of bankruptcy. But in the case of a bonâ fide execution without notice, we are disposed to think that no such relation exists. The plaintiffs, therefore, are entitled to judgment,

Pashley afterwards applied for and obtained leave to argue in support of the plea. In *Turquand v. Hawtrey*, the point, as to the sufficiency of the plea, was not argued, the question there being as to pleading several matters. The 2 & 3 Vict. c. 29, has not destroyed the doctrine of relation for all purposes; for instance, where a tortfeasor

submitted to the Court that the plea was an argumentative denial of the plaintiff's possession. The Court decided the case on the ground that there was a confession of the conversion]. The object of the 2 & 3 Vict. c. 29, was to protect the sheriff from the liability to which he was previously subject, by executing the process of the Court upon the goods of a party who had committed a secret act of bankruptcy, *Cooper v. Chitty* (a), *Carlisle v. Garland* (b). The act does not declare that the title of the assignees by relation, shall be put an end to, but that the execution "shall be deemed to be valid." *Gordon v. Harper* (c), *Owen v. Knight* (d), *White v. Teale* (e), and *Weeding v. Aldrich* (f), are authorities to shew that this defence could not be raised under the plea of not possessed. [Parke, B.—In *Weeding v. Aldrich* the Court do not appear to have considered the question whether the plea was an argumentative denial of the plaintiff's possession as well as of the conversion]. In *Samuel v. Duke* (g), this distinction was taken, namely, that if the act of conversion relied on is the seizure of the goods, the sheriff must plead specially a justification under the writ, but if the act of conversion be the sale of the goods, he may give his defence in evidence under a plea denying the plaintiff's possession. Here, the seizure is the conversion complained of, and the plea gives a colourable title to the plaintiffs, by admitting the property to have been in them. A colour of title is sufficient, though it is in reality a bad one. *Smith v. Adkins* (h), *Stephen on Pleading* (i), *Chitty on Pleading* (k), *Doctor Leyfield's case* (l). The plea admits the property in the goods to have been in

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| (a) 1 Burr. 20. | P. & D. 657. |
| (b) 7 Bing. 298; S. C. 5 M. & P. 102. | (g) <i>Ante</i> , vol. 6, p. 536, O. S.; S. C. 3 M. & W. 622. |
| (c) 7 T. R. 9. | (h) <i>Ante</i> , vol. 1, p. 129, N. S.; S. C. 8 M. & W. 362. |
| (d) <i>Ante</i> , vol. 6, p. 244, O. S.; 4 Bing. N. C. 54. | (i) p. 241. |
| (e) 12 Ad. & E. 106; S. C. 4 P. & D. 43. | (k) p. 557. |
| (f) 9 Ad. & E. 861; S. C. 1 | (l) 10 Rep. 88. |

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the assignees until the time of sale, *Giles v. Grover* (a), *Comyns v. Boyer* (b), *Fancourt v. Bull* (c), *Rockwood v. Fearar* (d). A plea which admits a *prima facie* title in the plaintiffs is good, though the subject-matter of defence might be given in evidence under the general issue, *Paramore v. Johnson* (e), *Hussey v. Jacob* (f), *Carr v. Hinchliff* (g), *Comyn's Dig.* tit. "Pleader" (E). In *Morant v. Sign* (h), this Court allowed express colour to be given in a plea to an action of trover. The same doctrine governs both express and implied colour, viz., that "the colourable title must be such as might induce an unlearned person to imagine it sufficient, yet it must be in legal strictness inadequate to defeat the plaintiff's title as shewn in the plea," *Chitty on Pleading* (i). It must be a matter of law which does not lie in the knowledge of lay gents, *Doctor Leyfield's case* (k) *Radford v. Harbyn* (l), *Com. Dig.* tit. "Pleader," 3 (M) 41.

J. W. Smith, contra. The plea is an argumentative traverse of the plaintiffs' possession as assignees. It is a fallacy to say, that the plea confesses a right of property in the plaintiffs before the seizure, for as against the defendant the assignees had no right either in fact or in law. It is clear that they had no possession in fact, and that they could have had none in law is evident from the language of *Parke, B.*, in *Hall v. Wallace* (m), that "the effect of the

sistent with the right stated in the declaration, as in the case of infancy or coverture which admit a contract in fact, though not binding in law. Here, no fact is confessed by the plea, but the plaintiffs' possession is denied argumentatively by a statement of facts which shew that since the 2 & 3 Vict. c. 29, they never could have had the possession. *Pearson v. Rogers*, was decided on the circumstance that the conversion was denied by the inducement, and the possession by the traverse. Neither does the plea give colour. In *Leyfield's case*, the corn was admitted to be in the possession at the time of taking it; but here, the possession in fact is not admitted, and the statute prevents any possession in law from taking place, *Rowe v. Ames* (a), *Ashby v. Minnitt* (b), *Nicolls v. Bastard* (c), *Butler v. Hobson* (d). Secondly, the plea is defective in not stating that the facts therein mentioned took place after the passing of the 2 & 3 Vict. c. 29, *Rex v. Kilderby* (e). Thirdly, the persons described as traders and bankrupts in the plea, do not appear to be the same as those mentioned in the declaration.

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Pashley, as to the additional points. It appears by necessary intendment, that Heathcote and Levesley, named in the plea, are the same persons mentioned in the declaration. The words at the end of the plea, "which possession is the said possession of the plaintiffs, as assignees, in the declaration mentioned," sufficiently identifies them. With respect to the objection, that it ought to be shown, whether the fiat and execution took place before or after the passing of the 2 & 3 Vict., the statute being general in its terms need not be averred. The law, as stated by Mr. Serjt. *Williams*, rests upon no sound principle, for how is it to be defined what statutes are recent and what not?

Cur. adv. vult.

(a) 6 M. & W. 747; S. C. *Ante*, vol. 8, p. 750, O. S.

(b) 8 Ad. & E. 121; S. C. 3 N. & P. 231.

(c) 2 C., M. & R. 659.

(d) 4 Bing. N. C. 290; S. C.

5 Scott, 798.

(e) 1 Wms. Saund. 309, a. n. 5.

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The judgment of the Court was delivered by

PARKE, B.—This was an action of trover, stating the plaintiffs to be assignees of the estate and effects of George Heathcote, and William Levesley, bankrupts, and stating the conversion in the time of the assignees. To this there was a special plea, that one George Heathcote, and one William Levesley, were at the time of issuing the fiat of bankruptcy, thereafter mentioned, traders, and it then avers that there was a *fi. fa.* issued under which the goods of the bankrupts were seized before the issuing of the fiat, and that there was no notice of any act of bankruptcy at the time of the seizure; it also states a sale which took place before the fiat, and then avers, that the assignees were entitled by relation; that the plaintiffs were appointed assignees of the said George Heathcote and William Levesley, that they were entitled to the goods and chattels, at and from the time that Heathcote and Levesley became bankrupt, which possession was the possession of the plaintiffs as assignees in the declaration mentioned. Then there is an averment, that this *fi. fa.* was not founded on any warrant of attorney or *cognovit*, given by way of fraudulent preference. To this, there is a special demurrer, on the ground that the assignees have declared as assignees of the bankrupts for conversion of goods and chattels in their own possession, and that the defendant, instead of simply traversing or denying that the plaintiffs as

indirect, and argumentative manner. The demurrer came on to be argued, and three objections were taken to the special plea; the first and principal one, that it amounted to an argumentative plea, that the plaintiffs were not possessed as assignees; secondly, that the persons described as traders and bankrupts in the plea, were not averred to be the same as those in the declaration, and, thirdly, that it was open to general demurrer, on the ground that the execution was not averred to have been executed after the passing of the act, 2 & 3 Vict. c. 29, nor the fiat to have issued afterwards. As to the first objection, it is clear that the defence insisted on by the plea, might have been given in evidence, either on one or the other of the two pleas of "not possessed," or "not guilty." But the question here, is not, whether the defence was admissible under one of the two pleas, but whether the plea is bad, on the ground that it is a plea of "not possessed:" whether it amounts to an argumentative denial of title, is not a question raised by the special demurrer. We think it does not amount to an argumentative plea of "not possessed," because there is in the plea an implied colour, for the plea admits the right of the assignees, by relation, to the lawful possession, at the time the defendant took possession of the goods under the *fi. fa.*, and the case resembles very closely that of a defence to an action of trespass for taking tithe, as *Dr. Leyfield's case*, in which case, the admitted possession of the plaintiff, at the time of the taking, gave a sufficient colour. We think, therefore, that the principal objection must fail. The second is answered, by reference to the allegation near the conclusion of the plea. The declaration states the plaintiffs to be assignees of George Heathcote and William Levesley. The plea begins, by stating, one George Heathcote and one William Levesley, to be, &c., and in that respect is objectionable: but we think that it is cured by the allegation, that the plaintiffs were appointed assignees of the said George Heathcote and William Levesley, and became entitled to possession, which possession was the said pos-

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session of the plaintiffs in the declaration mentioned. The third objection is, that neither the seizure nor the fiat is averred to have been subsequent to the statute, 2 & 3 Vict. c. 29. The answer is, that the statute is in its terms general, and is not confined to a seizure or a fiat subsequent to its passing. That is decided by *Nelstrop v. Scarisbrick* (a) and *Moore v. Phillips* (b). If the fact had been, that the assignees were appointed before the statute, it should have been replied as in the last mentioned case. There must be judgment in this case for the defendant.

Leave was given to amend, on a suggestion that the demurrer was put in, in consequence of the intimation of the Court in *Turquand v. Havotrey*.

(a) *Ante*, vol. 8, p. 746, O. S.; 6 M. & W. 684.

(b) *Ante*, vol. 9, p. 294, O. S.; 7 M. & W. 536.

HARRISON v. JONES.

The time for
moving for
judgment as in
case of a non-
suit is the same,

GRANGER moved for a rule nisi for judgment as in case of a nonsuit. It was a country cause, and issue was joined on the 6th of June, in Trinity Term, 1842. An

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ASSUMPSIT, for money had and received to the plaintiff's use.

The declaration alleged in the usual form, a promise to pay on request. Breach, non-payment.

Plea. That the money was received by the defendant, as the agent and servant of the plaintiff, and that after the making of the promise, and before the commencement of this suit, to wit, on the 7th day of July, A. D. 1840, the plaintiff directed and requested the defendant to forward and send the said sum of money by post, inclosed in a letter from the defendant to the plaintiff, to wit, from the Bethnal Green Road, in the county of Middlesex, where the defendant then resided, to Mousley, in the county of Leicester, where the plaintiff then resided; and that the defendant did then forward and send the said sum of money by post, inclosed in a letter from the defendant to the plaintiff, to wit, from the Bethnal Green Road aforesaid, to Mousley aforesaid, in manner and form as the plaintiff had so directed and requested him, the defendant, to do, as aforesaid. Verification.

Special demurrer, assigning for causes, that the plea was argumentative, inasmuch, as even supposing it to amount to a plea of payment, yet such fact was only stated by way of argument or inference; and that matters which properly afforded evidence of the fact of such payment, and which should, according to the rules of pleading, have been offered as evidence to the jury under the plea of payment, and not pleaded in bar, were improperly pleaded in bar; that the plea admitted the cause of action, but did not avoid the same by shewing accord and satisfaction thereof; that the plea did not answer all it professed to answer, because it did not offer any defence to the damages sustained by reason of the non-performance of the promises; that it was not stated that the defendant paid, or the

In assumpsit for money had and received to the plaintiff's use, the defendant pleaded, that after the making of the promise, the plaintiff directed him to send the money by post, and that he did so: Held bad, for not alleging either that the money was paid in satisfaction, or that the defendant was always ready to pay, and did pay, when requested.

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plaintiff accepted the matters mentioned in the plea, in accord and satisfaction of the causes of action in the first count; and that the plea consisted merely of evidence, and did not sufficiently shew that the matters mentioned in it, occurred before breach of the defendant's promises.

Watson, in support of the demurrer. The plea is a circuitous and argumentative mode of pleading satisfaction. The money is alleged to have been payable on request, therefore, there was an immediate debt to which the plea affords no answer. The defendant should have averred that he was always ready to pay the money. Besides, there is no statement in the plea that the money alleged to have been sent, was on account of the money had and received.

Dowdeswell, in support of the plea. The plea states, that the sum of money directed to be sent and actually sent, was the same sum of money as that with which the defendant is charged in the count to which it is pleaded, and even if the last objection were tenable, the plaintiff cannot avail himself of it, having omitted to suggest it as a cause of demurrer. With respect to the second, and only remaining objection, the count is for money had and received, which the defendant is alleged to have promised to pay on request. [*Alderson*, B.—The party is liable to damages

him, and that he complied with it. [*Parke, B.*—You do not however, aver that to have been the first request]. It is not to be assumed, that a defendant has been guilty of a wrong, of which consistently with every allegation in the declaration, and the facts stated in this plea, which are admitted, he may have been innocent. The plaintiff should have replied a previous request, if any such had been made. The defendant gets rid of his duty by shewing, that when a request was made, he was ready to pay.

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PARKE, B.—You had better amend: either aver that the money was paid to the plaintiff in satisfaction, or that the defendant was always ready to pay, and did pay when requested.

Amendment accordingly.

FROST and Another, Assignees of SLATER, a Bankrupt,
v. HEYWOOD and Another.

IN this case the defendants had obtained a rule, calling on the plaintiffs and one William Slater, respectively, "to appear before the Court, on, &c., in order that the said Court might exercise its jurisdiction in the adjustment of the several claims of the plaintiff and William Slater, pursuant to the powers and authorities given in the act of 1 & 2 Wm. 4, c. 58, s. 1," and directing that, in the meantime, all proceedings should be stayed. It did not appear, by the affidavit on which the rule was obtained, whether the defendants had pleaded or not.

The assignees of a bankrupt having sued a banker for money deposited with him by the bankrupt, a third party claimed the money as part of a fund which the bankrupt held in trust. On an interpleader rule, the Court ordered an action to be brought in the name of the bankrupt against the assignees, the

Pashley appeared for the claimants, and objected that as the statute required the application to be made "before

cestui que trust to find security for the defendants' costs.

The affidavit in support of an interpleader rule, should shew that the application was made before plea pleaded.

An interpleader rule called on the parties to appear before the Court "in order that it might exercise its jurisdiction on the adjustment of the several claims:" *Held*, sufficient in terms.

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plea," that fact ought to appear on the affidavits. If the defendants had pleaded, the Court had no jurisdiction. [Lord Abinger, C. B.—Have you an affidavit that they have pleaded?] It is for them to shew that they have come to the Court in proper time, and the affidavits shew that some time has elapsed since the plaintiffs declared. [Lord Abinger, C. B.—The statute does not prescribe any particular form of affidavit, and the Court are disposed to allow an amendment.] *Pashley* then waived the objection—Secondly, the rule is informal; it calls on the parties to appear before the Court, but does not, in terms, call on them to state the nature and particulars of their respective claims, that the Court may adjudicate on them.

The Court considered that there was nothing in the objection.

Pashley shewed cause on the merits. It appeared that W. Slater, who was a trustee under the marriage settlement of a Mrs. Vaughan, had deposited the money, for which the present action was brought, in the hands of the defendants, who were bankers. Slater having afterwards become bankrupt, the present action was brought by his assignees, who claimed the money as his property. A claim was then made by Slater, on the ground that this was

party here, and to permit the matter to be decided behind her back, would be to open a door to the greatest collusion. This proceeding by interpleader rule is a substitute for a bill in equity.]

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Crompton, for the plaintiffs. The case resembles that of a fraudulent preference by a bankrupt. The Court cannot interfere in cases of mere equitable claims; besides, a bill of interpleader would afford the advantage of the additional evidence of the cestui que trust.

LORD ABINGER, C. B.—We think we can do justice by the following arrangement. There must be an issue to try whether this money is the property of Mrs. Vaughan or not. Slater to be the plaintiff, and his assignees the defendants. Then, as Slater is a bankrupt, he ought to find security for costs, and as Vaughan and his wife are the parties beneficially interested, they ought to be responsible. It is very improbable that they will sue a bankrupt trustee in equity, when they can recover their money at law, by an action brought in his name. In the mean time, the present defendants must be discharged, and their costs defrayed out of the fund in Court.

Rule accordingly.

YATES and Others, Assignees of ALDRICH, a Bankrupt,
 v. SHERRINGTON.

THE declaration stated, that whereas, before the inter-marriage of the said Stephen John Aldrich and Isabella Hannah, his now wife, and before the said S. J. A. became a bankrupt, to wit, on, &c., the defendant made his promissory note in writing, and thereby promised to pay the said I. H., by her then name of Isabella Hannah Sherrington, the sum of 100*l.*, with legal interest on demand, and then, before the said marriage and the said bankruptcy, delivered

The assignees of a bankrupt may sue alone on a promissory note given to the bankrupt's wife before marriage.

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the said note to the said I. H., and afterwards and before the said S. J. A. became bankrupt, to wit, on, &c., the said S. J. A. intermarried with the said I. H., and thereupon, afterwards, after the said intermarriage, and after the said S. J. A. became a bankrupt, and after the plaintiffs had become, and while they were such assignees as aforesaid, to wit, on, &c., the defendant, in consideration of such premises, promised the plaintiffs, as assignees as aforesaid, to pay to them the money in the said note specified, with interest as aforesaid: and whereas, before the said intermarriage, and before the said bankruptcy, to wit, on, &c., the defendant was indebted to the said I. H., the now wife, for the said bankrupt, in 100*l.*, for money then lent by the said I. H. to the defendant, at his request; and whereas, in consideration of the last-mentioned premises, after the said intermarriage of the said bankrupt and the said I. H., and after the said bankruptcy, to wit, on the day and year last aforesaid, the defendant promised the plaintiffs, as assignees as aforesaid, to pay the last-mentioned money to them as assignees as aforesaid, on request; yet the defendant has disregarded his promise, and hath not paid the said monies and interest, or either of them, or any part thereof, to the damage of the plaintiffs, as assignees as aforesaid, of, &c.

Plea. That the defendant made the said promissory

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said money in the said last count mentioned, were due and payable to the said S. J. A., he, the said S. J. A., became and was a bankrupt; and the defendant further says, that the plaintiffs have commenced and are prosecuting this action as the assignees of the said S. J. A., to recover the sums so due to him before his bankruptcy, from the defendant, as in this plea aforesaid, and not otherwise; and the defendant further saith, that the said S. J. A. before, and at the time of his bankruptcy, was indebted to the defendant in a large sum of money, to wit, the sum of 2000*l.*, for money by the defendant, before that time, lent and advanced, and paid, laid out, and expended for the said S. J. A., at his request, and for money by the said S. J. A., before that time, had and received for the use of the defendant, and for money due and owing from the said S. J. A. to the defendant for interest, for the forbearance by the defendant to the said S. J. A., at his request, for divers long spaces of time, of monies due from the said S. J. A. to the defendant, and for money due from the said S. J. A. to the defendant, on an account then stated between them; which said sum of money wherein the said S. J. A. was so indebted to the defendant as aforesaid, before and at the time of the commencement of this suit, was, and still is due and owing to the defendant, and exceeds the damages sustained by the plaintiffs, as assignees as aforesaid, by reason of the non-performance, by the defendant, of the alleged promises in the declaration mentioned, and out of which said sum of money so due to the defendant, the defendant is ready and willing, and hereby offers to set-off and allow to the plaintiffs, as assignees as aforesaid, the amount of the said damages, according to the form of the statute in such case made and provided. Verification.

Special demurrer, assigning for causes, that it appears that the amount of the money specified in the said promissory note, in the said first count mentioned, and the debt in the last count mentioned respectively, were not, before or at the time of the bankruptcy, debts due to the

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said S. J. A., in his own right, but to him and the said L. H., his wife; and also, for that the said debts, for the recovery of which this action is brought, and the said sum of money intended by the defendant, in his said third plea, to set-off against the said debts, are not mutual debts, and cannot be set-off against one another; and also, for that the said plea amounts to the plea of non assumpsit: and also, that it is an argumentative denial of the promise to the assignees; and also, that it is, in other respects, informal, uncertain, and insufficient.

The defendant's points, as marked for argument, were, that it sufficiently appears that the sums of money mentioned in the declaration were due to the said S. J. A. alone; that the said sums, and also the money mentioned in the defendant's third plea, are mutual debts, and the defendant is entitled to set-off the debts mentioned in his said plea, against the debt, for which this action is brought; that if the debts mentioned in the declaration, were not the sole property of the said S. J. A., so as to entitle the defendant to set-off the said debt in his said third plea mentioned, the plaintiffs cannot maintain the present action, because the right vested in the bankrupt, which the plaintiffs, as his assignees, seek to enforce, being, as supposed, vested in him, jointly with his wife, she ought to have been made a co-plaintiff, or it ought to have been set forth,

bankrupt may sue in their own names for a debt due to the wife, *dum sola*. *Miles v. Williams* (a). That case was decided on the 4 Ann. c. 16, s. 63, which enacted, "that the bankrupt should be discharged from all debts by him due and owing at the time he became bankrupt." There the action was brought against husband and wife, on a bond made by the wife, *dum sola*, and the defendant pleaded the bankruptcy of the husband after marriage: the Court were all of opinion that the debt was the husband's debt, within the statute; and it being admitted at the Bar, that a debt due from the wife, and a debt due to the wife, must fall under the same consideration, *Parke*, C. J., in delivering the resolution of the Court, said, "and therefore I have considered how far a debt due to the wife would be within this act, to be assigned by the commissioners of bankruptcy," and after referring to the 13 Eliz. c. 7, and 1 Jac. 1, c. 15, s. 12, he says, "now I take the intention of these laws to have been, that the bankrupt having been guilty of a fraud, should not be trusted any more with the management of his estate, but that it should be put into other hands for the safety of his creditors, and that the bankrupt should have no further intermeddling therewith. So that upon this intention, all those effects and debts which he could take in or turn into money, the assignees were designed to have in as full a manner, either by action or otherwise, and that in their own name." That case has been incidentally mentioned and recognised in *Michell v. Hughes* (b), where it was held, that a right by husband and wife in right of the wife, to bring a writ of entry no abatement, passed by the assignment to the assignees of the husband on his bankruptcy. Secondly, the plea is a bad plea of set-off, *Ex parte Blagden* (c). The debt for which the action is brought, was the debt of the wife, and would have survived to her, if her husband had died without reducing it into possession. In *Rumsey v. George* (d), it

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(a) 1 P. Wms. 249.

(c) 2 Rose, 249.

(b) 6 Bing. 689; S. C. 4 M.

(d) 1 M. & Sel. 176.

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was held, that the husband alone could not be the petitioning creditor to support a commission of bankruptcy, in respect of a debt composed partly of a sum of money due to him in his own right, and partly of a sum due to his wife, *dum sola*. The defendant cannot set off a debt due from the husband, unless the cause of action upon which the plaintiffs sue, was a debt due to the husband, which is not the case, he never having reduced the note into possession. Where an action was brought by the husband on a promissory note given to his wife after marriage, it was held, that the defendant could not set off a debt due from the wife, *dum sola*.

Peacock, *contra*. It must be admitted that the plea is bad, unless it amounts in substance to a set off against a debt due to the bankrupt. The cases cited on the other side are distinguishable, because here the action is brought upon a contract entered into with the wife before coverture. In *Gaters v. Madeley* (a), it was held, that a promissory note was nothing more than a chose in action, and when given to a married woman survives to her unless her husband elect to take it. In *Mitford v. Mitford* (b), Sir *W. Grant* draws a distinction between a particular assignment for valuable consideration, and an assignment by operation of law as in bankruptcy. That case was followed by *Pierce v.*

chose in action could be recovered only in an action in which she was made a co-plaintiff with her husband, or with his assignees, in case he became bankrupt." If the assignees could sue without joining the wife, the effect would be to destroy her right of survivorship.

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Erle replied.

Cur. adv. vult.

The judgment of the Court was delivered by

LORD ABINGER, C. B.—In this case the judgment will be in favour of the plaintiffs. We think the case cited by Mr. *Erle* from *Peere Williams*, of *Miles v. Williams*, decided, according to the report of the case, by Lord *Macclesfield*, at that time Lord Chief Justice in the Queen's Bench, that for a chose in action which belonged to the wife of a man before marriage, an action might be maintained by the assignees of the husband, who had become bankrupt, that the assignment was an absolute transfer, which enabled them to institute a suit to reduce it into possession without the concurrence of the wife. We think that is a case in point and decides the present; and when we find a case, in point, it is better not to disturb it on fanciful theories. After all, if the interest of the wife is not extinguished by the commissioners of bankrupts' assignment to the assignees of this chose in action, which is a promissory note given to the wife before her coverture, why, then it would in law follow, that there is some sort of remedy for her. The precise case must occur, in order to give rise to the contingency, in which she would have a claim. If in this case her husband should die before the assignees should recover, the question will then be open, what remedy the wife has? If the wife has any interest in it she must have some remedy. In the mean time, the case is a precise authority that the assignees are at liberty to enforce the recovery of this chose in action in their own name. If the assignees can bring an action in their own name, then it is quite

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decided that a set-off cannot exist of any claim due in respect of the husband and wife, or from the husband and wife. That has been settled in several cases which have been decided, and not been disputed. I think Mr. *Peacock* admitted, that if the action could be maintained by the assignees in their own name, then he would not insist at all on the right of set-off. The judgment on the demurrer must be for the plaintiffs.

Judgment for the Plaintiffs.

SMITH v. MARRABLE.

In an action for use and occupation, a defence that the premises were uninhabitable, by reason of a nuisance, may be given in evidence under the general issue.

ASSUMPSIT for the use and occupation of a furnished house. Plea, non assumpsit.

At the trial before Lord *Abinger*, C. B., the following agreement was proved.

"Brighton, September 14th, 1842.

"Mr. John Smith, of No. 24, St. James Street, agrees to let, and Sir Thomas Marrable, to take the house, No. 5, Brunswick Place, at the rate of eight guineas, per week, for five or six weeks, at the option of the said Sir Thomas Marrable,

(Signed)

"THOMAS MARRABLE.

to live in it longer, they should find a verdict for the defendant. The jury having found for the defendant,

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Hayward moved for a new trial, on the ground of misdirection, and also that the evidence was improperly received, under the plea of non-assumpsit. An actual occupation having commenced under the agreement, the defence should have been pleaded in confession and avoidance. In *Waddilove v. Barnett* (a), it was held, that in an action for use and occupation, payment of rent before notice to a mortgagee must be specially pleaded. The present defence, in substance, is, that the plaintiff has been guilty of a fraud, in concealing a nuisance.

PARKE, B.—In answer to an action for use and occupation, the defendant may shew, under the general issue, that there never was such occupation, as would render him liable, in point of law. I think that non assumpsit was the only proper plea in this case, and that if the facts, constituting the defence, had been pleaded specially, the plea would have been bad, as amounting to the general issue.

LORD ABINGER, C. B., ALDERSON and GURNEY, B.'s, concurred.

(a) *Ante*, vol. 4, p. 347, O. S.; 2 Bing. N. C. 538; 2 Scott, 763.

GIBBONS v. SPALDING.

IN this case, an order had been made by *Gurney*, B., for holding the defendant to bail under the 1 & 2 Vict. c. 110. The only affidavit in support of the order was made by the plaintiff, who after swearing to the debt, proceeded to state "that deponent had been informed, by one Isaac Davis, of

An order for arrest under the 1 & 2 Vict. c. 110, s. 3, may be made upon an affidavit, containing hearsay evidence, but in such case, the name of the informant must be stated.

the name of the informant must be stated.

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97, New Bond Street, in the county of Middlesex, whom he knew to be the intimate friend of the defendant, and which information the deponent believed to be true, that the defendant intended to leave England for Brussels, in the kingdom of Belgium, and that, from day to day, it was uncertain at what time he would leave, and that he might even have left at the time of swearing the present affidavit."

Thesiger moved to rescind the order, on the ground of the insufficiency of the affidavit. The third section of the 1 & 2 Vict. c. 110, enacts, "that if a plaintiff, in any action in any of her Majesty's superior Courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a Judge, or without such order, shall, by the affidavit of himself or some other person, show to the satisfaction of a Judge of one of the said superior Courts, that such plaintiff has a cause of action against the defendant, to the amount of twenty pounds or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they shall be forthwith apprehended, it shall be lawful for such Judge, by a special order, to direct that such defendant so about to quit England, shall be held to bail," &c. The intention of the Legislature was, that

are but exceptions, and he must see the case fairly brought within them."

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PARKE, B.—We think evidence of this nature a sufficient foundation for orders like the present, and it is every day's practice to make them on such. Indeed, in many cases, it might be difficult to procure better, and if we were to establish too strict a rule with respect to these affidavits, it would render the statute a dead letter. There is, however, this limitation to hearsay evidence, that no Judge ought to make an order of this description, merely, upon the plaintiff's swearing that he is informed, and believes that the defendant is about to leave the country; the plaintiff should be required to state in his affidavit the name of the person giving him that information. The Judge then has before him information, which the defendant may afterwards explain or deny, and if he can do so, he will be, of course, discharged.

Rule refused.

SUTHERLAND v. PRATT and Others.

ASSUMPSIT. The declaration stated, that the plaintiff on the 8th day of September, A. D. 1841, caused to be made a policy of assurance, (which was set forth verbatim,) purporting thereby and containing therein, that Boggs,

A declaration stated that the plaintiff caused a policy of assurance to be effected with the defendants on three hun-

dred and sixty bales of cotton, lost or not lost, whereby B. & Co., as well in their own name as in that of all other parties interested, were assured in 2000*l.*, and in consideration thereof, and that the plaintiff paid the defendants the premium, the defendants promised that they would become assurers to the plaintiff of the said sum of 2000*l.*; that the plaintiff was, during the voyage, interested in the goods, and that the assurance was made for his use and benefit, and on his account, and that the goods were damaged by the perils of the sea during the voyage. The defendants pleaded, secondly, that the policy was not caused to be made by or on behalf of the plaintiff, *modo et formâ*: Thirdly, that the plaintiff did not pay the premium, or promise the defendants to observe the terms of the policy: Eighthly, that the goods were damaged before the plaintiff had any interest in them.

Held, that the second and third pleas were bad, as amounting to the general issue.

Held also, that the declaration was good and the eighth plea bad, and that if the defence intended, was, that the plaintiff purchased the goods when damaged, the proper form of plea would have been to traverse the loss by perils of the sea.

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Taylor and Co., as well in their own names, as for and in the name or names of all and every person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, and cause themselves and them and every of them to be assured with the General Maritime Assurance Company, lost or not lost, at and from Bombay to London, with leave to call at all ports and places on either side of, and at the Cape of Good Hope, including the risk of craft to and from the vessel, upon any kind of goods and merchandise, and also upon the body, tackle, &c. of and in the ship called the Inglis, beginning the adventure upon the said goods and merchandise from the loading thereof on board the said ship at —, and upon the said ship, &c., — and so should continue and endure during her abode, thereupon the said ship, &c. And further, until the said ship with all her tackle, &c., and goods and merchandise whatsoever, should be arrived at —: and upon the said ship, &c., until she had there moored at anchor twenty-four hours in good safety, and upon the goods and merchandise, until the same should be there discharged and safely landed. The insurance was declared to be on three hundred and sixty bales of cotton, and the policy, after admitting the receipt of the premium, stated, that the company were content, and did take upon them that assurance for the sum of 2,000*l*.

fulfil all things therein mentioned, on their part and behalf, as assurers of the sum of 2,000*l.* to be performed and fulfilled. That the said goods on the 1st of September, 1841, were shipped at Bombay, on the voyage; that the plaintiff was during the voyage, to wit, on the same day and year last aforesaid, interested in the said goods in the policy mentioned, and so loaded on board the ship to the amount insured; that the said assurance was made for the use and benefit, and on the account of the plaintiff as aforesaid, that the ship afterwards sailed on the voyage, and being injured by tempestuous weather became filled with water, whereby the said goods were damaged and rendered of no use or value to the plaintiff.

The defendants pleaded, first, non assumpsit. Secondly, that true it was that the said policy of insurance, purporting and containing therein, that Boggs, Taylor and Co., did make assurance of the matters and things, according to the terms and provisions of the said policy as in that behalf in the declaration mentioned and set forth, was made, to wit, upon the day and year in that behalf in the declaration alleged; yet the defendants say, that the said policy was not caused to be made by or on behalf of the plaintiff in manner and form alleged, concluding to the country. The third plea alleged, that the plaintiff did not, nor did any person on his behalf, pay the said premium, or any part thereof, nor promise the defendants to perform and fulfil the things in the said policy mentioned on behalf of the assured to be performed and fulfilled in the manner and form alleged, concluding to the country. Eighth plea, that although the said ship, with the said goods on board, departed and set sail upon the said voyage from Bombay to London, and although the said goods were damaged and diminished in use and value on the said voyage, as in the declaration mentioned, and although after the commencement and during the course of the said voyage, and after the ship had sailed on the said voyage for divers, to wit, thirty-five days, and for divers, to wit, one thousand miles,

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the plaintiff acquired an interest in the said goods, and then, to wit, on the 10th day of September, A. D. 1841, became and was interested in the said goods, to wit, to the value and amount in that behalf mentioned, nevertheless that the said goods were so damaged and diminished in value, as in the declaration mentioned, before the plaintiff acquired or had any interest therein, to wit, upon the 20th day of August, A. D. 1841. Verification.

To each of the second and third pleas the plaintiff demurred specially, shewing for causes that they amounted to non-assumpsit, and also that the matters alleged in them might be given in evidence under the issue joined on that plea, and also that the pleading, in the manner as pleaded by the defendant in the second and third pleas, tended to unnecessary prolixity and length. To the eighth plea there was a general demurrer, and the point marked for argument was, that the policy being effected "lost or not lost," the underwriters were responsible for the loss, notwithstanding it happened before the plaintiff acquired an interest in the goods.

Martin, in support of the demurrer to the eighth plea, cited *Craufurd v. Hunter* (a), *The British Insurance Company v. Mages* (b), 19 Geo. 2, c. 37, s. 11, *Mead v. Davison* (c), *Paine v. Meller* (d), and *Stockdale v. Dunlop* (e).

non-assumpsit will operate as a denial of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties," and it is thence assumed, that the general issue would merely raise a question as to the execution of the policy. But that is not so, for the example which is given must be read in connection with the rule, "that non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." That the consideration is parcel of the promise is evident from the first example, viz. "in an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration." Thus in an action for the breach of the warranty of a horse, the plaintiff must shew a sale to himself, and the issue would not be supported by evidence of a sale to a third person. So in the present case the plaintiff would be bound to prove the matters traversed by the second and third pleas.

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Greenwood, contra. The declaration is bad, for its object is to defeat the answer which the plaintiff is aware could be given to a claim by Boggs, Taylor and Co. If the plaintiff has purchased the goods from them, they would be his trustees as to the amount recovered, *Sparkes v. Marshall* (a). But on the face of this declaration there is nothing to shew that the plaintiff has any interest. The ordinary mode of alleging interest, is to state that the plaintiff was interested at the commencement of the risk, "and thence continually afterwards until and at the time of the loss," *Chitty on Pleading* (b). There is no precedent for such a declaration as this, which does not shew that the plaintiff has sustained any damage; since it is consistent with every averment contained in it, that the plaintiff has bought the goods in a

(a) 2 Bing. N. C. 761; S. C. 3 Scott, 172.

(b) vol. 2, pp. 103, 107.

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damaged state, and at a reduced price, and so may have sustained no injury. The defect is not aided by the allegation, "that the goods became of no use or value to the plaintiff," for that averment could not be traversed since the deterioration of the goods rendered them of as little value to the whole world as to the plaintiff. If the goods had been entirely lost at the time of the plaintiff's purchase, he could have sustained no injury, for in every sale of a specific chattel there is an implied engagement that the thing exists, *Barr v. Gibson* (a). So if there has been a partial loss, and the injury has happened before the sale, the purchaser must take the goods as he bought them, and pay the stipulated price. It may turn out that he has made an improvident bargain, but the insurers can be no more liable to pay for a partial damage, than for a total loss, *Lynch v. Dalzell* (b), *The Sadlers' Company v. Badcock* (c). There is no case in which a party has been allowed to recover who had not an interest at the time of the loss, *Rhind v. Wilkinson* (d), and *Abitbol v. Bristow* (e), are authorities in favour of the proposition contended for. The second plea is good, even though the matter traversed by it might have been in issue under non-assumpsit, for it selects a single and material point upon which to rest the determination of the cause. Such a mode of pleading does not contravene the rule laid down in *Com. Dig.* tit. "Pleader," (E) 13, "that

only facts on which the issue might be turned in evidence, and, consequently, not a good plea, because they drew to the examination of the Court, what was proper to be determined by the jury, but they gave the defendant leave to traverse any material points in the plaintiff's declaration, in order to bring that one single point in issue, and to which they might apply their evidence alone; therefore, in debt for rent, if it were by deed, they might plead non est factum; if it were without deed, non-demisit, or nothing in arrear, or that they never entered unless it was by deed, and then they were estopped by their own acceptance, and yet all these points were in issue on nil debet." In *Stephen on Pleading* (a), several examples are collected illustrative of the rule, that if a party pleads in a more special way, matter which is constructively and in effect the same as the general issue, such plea is bad; the first is from the Year Book, 10 Hen. 6, c. 16, where to an action for entering the plaintiff's warren, the plea was thus:—"Il n'ad. nul tiel garren, Prest," and that was held bad, but the true ground may have been, that it improperly concluded with a verification. Another instance is, a plea of non depascit herbas, to an action for breaking and entering a close and depasturing the grass, 22 Hen. 6, c. 37, but there the plea professed to answer the whole action and answered but a part. So in debt for the price of a horse sold, plea that the defendant did not buy, and that was held bad as amounting to nil debet, 22 Edw. 4, c. 29. Other instances are collected in *Vin. Abr.* tit. "*Certainty in Pleading*," and *Brooke's Abr.* tit. "*Traverse*," 275, in most of which the pleas were objectionable upon grounds similar to those mentioned. Also, in *Bac. Abr.* tit. "*Pleas and Pleading*," (G) 2; *Com. Dig.* (E) 14, several cases are cited, and there too the pleas were open to the objection of prolixity. But, there is no authority, ancient or modern, which forbids a party to select a single material point to traverse it. Convenience shews that

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(a) p. 418, 3rd. ed.

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he should be allowed to do so : for suppose an action for a wilful misrepresentation respecting a ship, not guilty would put in issue not merely the knowledge of the defendant, but also the state of the ship, and the fact of making the representation, but the only defence of which the party might wish to avail himself, is perhaps the want of knowledge, yet he is to be compelled to deny facts which he does not mean to dispute, and subject the other party, or himself, in the event of failure, to a large amount of unnecessary costs. But assuming such plea to be bad at common law, the New Rules have rendered it necessary, for under them non-assumpsit would merely put in issue the execution of the policy by the defendants. In *De Pinna v. Polhill* (a), the declaration alleged, that the plaintiff was the author of a musical composition, and as such author had a right to it, and in consideration of that right, and that the plaintiff would sell it to him, the defendant undertook to buy of him the right and to pay the price; upon the trial, *Tindal*, C. J., ruled that the defendant could not, under non-assumpsit, deny the authorship or copyright, or that the plaintiff sold the production to the defendant. So in the present case, unless the second plea was on the record, the plaintiff would succeed upon proving the subscription by the defendants to the policy set out in the declaration. The same observation will apply to the third plea, which traverses the considera-

nature of the general issue, and that matter specially pleaded, which amounts to the general issue, is still bad.

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The judgment of the Court was delivered by

PARKE, B., (after stating the pleadings.)—The only question on the merits of the case, (the others being mere matters of form,) is raised by the general demurrer to the eighth plea, and we are of opinion that it contains no answer to the declaration. The plea admits expressly that the plaintiff had, during the voyage, an interest in the goods on board to the amount insured thereon, and it also admits impliedly (since it does not deny it) the allegation that the insurance was made for the use and benefit, and on account of the plaintiff, and that the insurance was a contract of indemnity to the plaintiff against any loss in respect of that interest, by any of the perils insured against; and this being admitted, the simple question is, whether it is any answer to an action on a policy on goods lost or not lost, that the interest in them was not acquired until after the loss? We are of opinion that it is not. Such a policy is clearly a contract of indemnity against all past as well as all future losses sustained by the assured in respect of the interest insured by the perils named in the policy. It is just the same as if the plaintiff, having purchased goods at sea, the defendant had promised and agreed, if the goods at the time of the purchase had sustained any damage, that he would stand to it. The plea, therefore, is bad in substance. It was contended by Mr. *Greenwood*, in a very able argument, that, in pleading, it would be assumed that the plaintiff bought the goods in their damaged state, and, consequently, was not entitled to any indemnity for that damage. But it does not appear that he purchased them as damaged goods: if that had been true, he could not have recovered on this policy on a plea denying the loss by perils of the sea, and that would have been the proper

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form of the plea to raise the question. It remains, then, to consider the objections which are raised to the two other pleas. To the second plea, the objection is, that it amounts to the plea of non-assumpsit. To that, it is answered, that it does not amount to the general issue at common law, but is only a traverse of part of what might have been included in it, which is permitted; and, secondly, if bad at common law, it is rendered good by virtue of the first pleading rule, a rule relating to pleas in assumpsit. We think this plea bad at common law. It is true it does not resemble most of the pleas which amount to the general issue, which usually contain new matter and conclude with a verification, and are bad as argumentative traverses, but it is bad, on the ground that the law has provided an appropriate mode of denial of particular facts, which must be followed by the pleader, and that in order to avoid long records. That is laid down in *Warner v. Wainsford (a)*, and other instances of the same rule occur in the Books. Thus, in trespass upon a warren, it was held to be a bad plea that the plaintiff had no such warren, 10 Hen. 6, c. 16; in trespass to a close, and depasturing the herbage, that the defendant did not depasture the herbage, 22 Hen. 6; and to debt for the price of a horse, when sold, that the defendant did not buy, *Vin. Abr.* tit. "*Certainty in Pleading*,"

(A) 15. To which may be added the recent case of

officer to whom it was addressed at the time of the emanation of the writ, *West v. West* (a): on the other hand, where the general issue of nil debet involved more than one distinct proposition, as, for instance, where it was pleaded to an action of debt for rent which accrued under a lease, and by subsequent enjoyment, it was allowed the defendant, if it were by deed, to deny the indenture by non est factum, on the demise, if not by indenture, by non demisit, or to plead riens in arrear, as well as nil debet. That is laid down by *Gilbert, C. B.*, in his *History of the Common Pleas*. It is not easy to reconcile these cases unless we assume that non-assumpsit, non-demisit, and riens in arrear, are formal modes of traverse as well as nil debet, and on that account permitted. Whether that be so or not, there is no authority for holding that each fact, constituting one entire proposition, as that a valid contract was made between the plaintiff and defendants, can be made the subject of a distinct traverse. The plea in this case is, in effect, that although there was a contract by the defendants by the policy, it was not made to the plaintiff, and this case clearly resembles that in which to an action on a bond, the defendant, admitting the execution of the bond, alleged that it was not made to the plaintiff, which was held to be equivalent to non est factum, *Gifford v. Perkins* (b). We are, therefore, of opinion, that the second plea is bad at common law. It has, however, been said, that by the first pleading rule, the plea of non-assumpsit would not deny that the policy was procured to be made by or on behalf of the plaintiff, but simply the subscription of a policy, containing the terms stated in the declaration; and if so, the defendants might certainly traverse that it was caused to be made by or for the plaintiff. But we are of opinion, that according to the true construction of the pleading rules, non-assumpsit puts in issue, not merely the subscription of a policy, but of a policy caused to be made by the plaintiff, and containing those

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(a) 1 Ld. Raym. 674.

(b) 1 Sid. 450.

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terms, in the same way as non est factum would put in issue a bond to the plaintiff in the case just stated. An action on the policy is mentioned in the pleading rules only as an example, illustrating the general rule previously given, the object of which general rule is, to confine the operation of the plea of non-assumpsit, which had before operated as a denial of all the facts and all the liabilities at the time the action was brought, to a denial of the contract express or implied, alleged in the declaration. Every such contract imports that there are two parties to it, and a denial of the contract alleged, is a denial of a contract with the plaintiff. Considering the example, therefore, as merely illustrating the rule, we think it clear, that in an action on the policy, the plea of non-assumpsit, denying that the defendant ever contracted by such a policy with the plaintiff, puts in issue the fact that the plaintiff caused the policy to be made. The second plea, therefore, is bad. For the same reason, the third is also bad; all the facts put in issue by it, are only parts of one proposition, that is, that the defendants contracted with the plaintiff, and could have been put in issue by non assumpsit. The defendants may have liberty to amend, otherwise

Judgment for the Plaintiff.

and demanded the costs, when he was told, that Messrs. Mayhew were merely the agents of the defendant's attorney, who resided in the country, and that they would immediately write to their principal about it. On the following day, the Judge's order and allocatur were made a rule of Court, with costs of the rule to be paid by the defendant.

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Petersdorff had obtained a rule, calling on the plaintiff to shew cause why so much of the rule, as required the defendant to pay the plaintiff the costs of making the order a rule of Court, should not be struck out, against which

Kelly shewed cause. The rule sought to be altered, is in conformity with the provisions of the rule of this Court, of the 27th of May, 1840, by which it was "resolved by the Judges, that when a Judge's order is made a rule of Court, it shall be part of the rule of Court, that the costs of making the order a rule of Court, shall be paid by the party, against whom the order is made: provided an affidavit be made and filed, that the order has been served on the party or his attorney, and disobeyed." The first objection is, that service of the order on the town agent of a country attorney, is not a service on the attorney of the party, within the meaning of the above rule. [*Parke, B.*—That objection cannot prevail. The Masters have all agreed that for the purposes of this rule, service on the agent who carries on the business in the Court above, is a good service. If it were otherwise, there would be great difficulty in recovering costs of this kind.] It is further objected, that there has been no disobedience of the order, inasmuch as the agents said, they would write to the attorney in the country, and time should have been allowed for that purpose. But the agent had two days' notice of the taxation, and was bound to procure funds to meet contingencies. It might as well be said, that execution should not issue on a judgment, until after the agent had a reasonable time for communicating with his principal in the

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country. The word "disobeyed" in the rule must be construed as synonymous with "not immediately complied with."

Petersdorff, in support of the rule. There is no analogy between this case and that of a judgment; with respect to the latter, the party is entitled to immediate execution; but it is evident, that the Judges, who framed this rule, never intended that the party should stand in the same situation; or why provide that the order should not be put in force, unless disobeyed after service?

PARKE, B.—The rule does not say that the party must, in terms, refuse to pay; it is a disobedience, if he does not pay immediately. The party employing the agent, is bound to provide him with money to meet demands of this kind. Besides, it is much better, for the sake of all practitioners, to adopt one general rule on the subject, than to enter into the merits of each particular case. In one case the principal might reside in Northumberland; in another, in some county, near London, and the time would have to be apportioned to meet each particular case, which would produce great inconvenience. The present rule must, therefore, be discharged.

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HESKETH v. FAWCETT.

ASSUMPSIT. The declaration stated that the defendant was indebted to the plaintiff in 100*l.*, for work, labour, and materials, and in 100*l.*, for money due on an account stated. Plea, as to 10*l.* parcel, &c., a tender, and payment of that sum into Court.

Replication : that before the making of the tender alleged, and before and at the time of the demand and refusal hereinafter mentioned, a larger sum than 10*l.*, to wit, the sum of 31*l.*, being part of the money in the declaration mentioned, the said sum of 31*l.*, including the said sum of 10*l.*, was due from the defendant to the plaintiff on account of one and the same of the said causes of action in the declaration mentioned, to wit, the said cause of action in the said first count mentioned, and that before the making of the said tender in the plea alleged, to wit, on, &c., the plaintiff demanded of the defendant payment of the said sum of 31*l.*, which so then included the said sum of 10*l.*, yet the defendant did not pay to the plaintiff the said sum of 31*l.*, or any part thereof, but then wholly neglected and refused to pay to the plaintiff the said sum of 31*l.*, or any part thereof. Verification.

Special demurrer, assigning for causes, that the replication admits the tender of the sum of 10*l.*, but does not avoid the effect of such tender by shewing a subsequent demand of that particular sum, and also that the replication does not shew with sufficient certainty, that the sum of 31*l.* constituted a debt due upon one entire contract.

Cowling, in support of the demurrer. The replication, in substance, states, that at the time of the tender, a larger sum was due to the plaintiff, which he demanded, and the defendant refused to pay. It therefore admits the tender of the amount mentioned in the plea, but affords no answer

A declaration in assumpsit, stated the defendant to be indebted to the plaintiff in 100*l.*, for work and labour, and in 100*l.* for money due on an account stated. Plea, as to 10*l.* parcel, &c., a tender of that sum : Replication, that a larger sum than 10*l.*, to wit, 31*l.*, being part of the money in the declaration mentioned, including the 10*l.*, was due on account of one and the same causes of action in the declaration mentioned ; that the plaintiff demanded the said sum of 31*l.*, and defendant refused to pay it.

Held, bad, on special demurrer.

Semble, that where a sum is due on an entire contract, and the defendant pleads a tender of a smaller amount ; the plaintiff may reply that a larger sum was due, in respect of that entire contract.

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to it. *Tyler v. Bland* (a) will perhaps be relied upon by the other side: there, to assumpsit for work and labour, the defendant pleaded as to 4*l*. 16*s.*, parcel, &c., a tender of that amount: the plaintiff replied, that at the time of making the tender 7*l*. 16*s.*, (of which the said sum of 4*l*. 16*s.* was parcel,) was due from the defendant to the plaintiff, on account of the causes of action in the declaration mentioned, so that, before the said tender, the plaintiff demanded payment of the said sum of 7*l*. 16*s.*, which the defendant refused, and it was held that the replication was good. Since that decision, a similar point has come before the Court of Queen's Bench, in a case of *Brandon v. Newington* (b); there, to an action of debt for goods sold, the defendant pleaded, except as to 1*l*. 17*s.*, *nunquam indebitatus*, and as to 1*l*. 17*s.*, a tender: to the latter plea, the plaintiff replied, that before and at the time of making the tender, and before and at the time of making the demand and refusal hereinafter mentioned, a debt amounting to a larger sum than 1*l*. 17*s.* was due, and that before the tender the plaintiff demanded payment of the said debt, yet the defendant did not then pay the same, or any part thereof, and that no set-off or other just cause of action then existed for non-payment by the defendant of the same or any part thereof; and it was held, on special demurrer, that the plea of tender was good, and that the replication was no answer to it,

v. *Godwin* proceeded, the sole cause of action there being one entire claim in respect of a promissory note. But then the replication in the present case should have averred that the 31*l.* was due in respect of one entire debt. There is scarcely any case of tender in which there is not a demand of a larger sum, and great inconvenience would ensue if this form of replication be held good, for the question raised would not be as to the fact of a tender having been made, but as to how much was due. [*Parke*, B.—Is the plea good. The principle of a plea of tender is this, that the defendant has always been ready at all times to pay upon request, and on a particular occasion offered the money.] A plea of tender of part of the sum claimed has always been considered good. An example occurs in *Coke's Entries*, 141 *b*, where to debt on bond, the defendant pleads a tender to part of the sum claimed. In *Haldenby v. Tuke* (*a*), the declaration contained four counts, in each of which 3*l.* 18*s.* 10*d.* was claimed: and a tender was pleaded of the sum mentioned in the first count only, to which the plaintiff replied a previous demand, and refusal of that precise sum. So in *Giles v. Hart* (*b*), to indebtedness *assumpsit*, and a quantum meruit for goods sold, the defendant pleaded non *assumpsit* as to all but 13*l.*, and as to that sum a tender. [*Alderson*, B.—*Cotton v. Godwin* and *Giles v. Hart* cannot stand together. *Parke*, B.—Is there any precedent of a plea of tender to part of the amount of a promissory note?] It is believed not; but there seems no reason why, if a party tendered a part of the money mentioned in the note on the day it became due, he should not be allowed to plead the tender as to such part. [*Parke*, B.—No: the principle of a tender is, that the party has performed his contract, which in that case he could only do by a tender of the entire sum. Here, the difficulty arises from the general form of declaration, which

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(a) *Willes*, 632.

(b) 12 *Mod.* 152; S. C. 1 *Ld. Raym.* 254

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may apply either to one or to several contracts. The cases of *Spybey v. Hide*, and *Rivers v. Griffiths*, are not at all at variance with the decision of this Court in *Cotton v. Godwin*; all that those cases decide is, that where the plaintiff replies a demand of the sum alleged to have been tendered, that means a demand of the *precise sum*. It is very different, where the replication shews that the sum tendered was part of a larger sum, due upon an entire contract, and which larger sum was demanded.]

Tomlinson, contra. The cases cited are no authority against this form of replication. *Cotton v. Godwin*, shews, that where there is an entire demand and a plea of tender of a smaller sum, the plaintiff may reply that a larger sum was due. [*Parke*, B.—Assuming that to be so, the difficulty here is, that the replication does not aver that the amount tendered was parcel of an entire sum]. It states that “the sum of 31*l*. including the said sum of 10*l*. was due from the defendant to the plaintiff, on account of one and the same of the said causes of action in the declaration mentioned,” which is equivalent to an averment, that it was due on one and the same contract. [*Parke*, B.—No: one and the same cause of action means a cause of action for work and labour, and that may constitute a debt which arises from ten different contracts. You had better amend.]

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EXCHEQUER CHAMBER.

SKEY and Others v. CARTER.

THE question, in this case, being precisely similar to that in *Whitmore v. Robinson* (a), the Court of Exchequer gave judgment for the plaintiffs, upon which a writ of error was brought and argued on the 1st of December, 1842, by *The Attorney General*, (with whom was *Taprell*,) for the plaintiffs in error, and *R. V. Richards*, (with whom was *J. W. Smith*,) for the defendants in error.

The decision of the Court of Exchequer, "that the 2 & 3 Vict. c. 29, has not rendered valid, executions on judgments on warrants of attorney, executed by seizure, after a secret act of bankruptcy, but not completed by sale of the goods, prior to the issuing of the fiat," affirmed on error.

Cur. adv. vult.

The judgment of the Court was delivered by

TINDAL, C. J.—This case was argued before Lord *Denman*, myself, Mr. Justice *Williams*, Mr. Justice *Coltman*, Mr. Justice *Erskine*, and Mr. Justice *Maule*; and in the absence of Lord *Denman*, I now proceed to deliver the judgment of the Court, in which he, as well as the other absent Judges, agrees. This was an action of trover, brought by the defendants in error, as assignees of one Thomas Smith, a bankrupt, against the plaintiff in error, as the registered public officer of the Gloucestershire Banking Company, for the conversion, by the company, of certain goods belonging to the defendants in error, as assignees, and the question raised by the pleadings was, whether a sale by the sheriff of the goods mentioned in the declaration, under the direction and at the suit of the company, was protected by the recent statute, 2 & 3 Vict. c. 29. The facts admitted by the pleadings were, that the company had entered up judgment against the bankrupt by *nil dicit*, in an action not commenced adversely, on a warrant of attorney, given by the bankrupt; but not by way of fraudulent preference.

(a) *Ante*, vol. 1, p. 135, N. S.; S. C. 8 M. & W. 463.

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A fieri facias was issued on this judgment, subsequently to which, and after a secret act of bankruptcy, of which the company had no notice, and within less than two calendar months before issuing the fiat, the goods were bonâ fide seized by the sheriff, under the fieri facias, and, after the date and issuing of the fiat in bankruptcy, and after notice thereof to the company, sold by the directions of the company. On this state of facts, the Court of Exchequer, in accordance with their previous decision, in the case of *Whitmore v. Robinson (a)*, gave judgment in favour of the assignees, and the present writ of error has been brought, in order to have that judgment reviewed. The question is one of considerable importance, and of some difficulty; but we think that the solution which has been given of it by the Court of Exchequer is correct. The 2 & 3 Vict. c. 29, after reciting the 82nd section of the 6 Geo. 4, c. 16, and the 12th section of the 2 & 3 Vict. c. 11, enacts, among other things, that "all executions and attachments against the lands and tenements, or goods and chattels of any bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any act of bankruptcy by such bankrupt committed, provided the person or persons, at whose suit, or on whose account such execution or attachment shall have issued, had not, at the time of levying such execution or

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preamble, and in effect, gives to an execution, executed or levied before the date or issuing of the fiat, the same protection as the former statute afforded to those executions against the goods of a bankrupt, which were, *bonâ fide*, executed and levied, more than two calendar months before the issuing of the commission, notwithstanding any prior act of bankruptcy by him committed, provided the person suing out the execution had no notice of any prior act of bankruptcy, and with the exception of those cases falling under the proviso in the latter end, against fraudulent preference. It, therefore, becomes important to ascertain how the law stood, under the former statute, in the case of an execution on a judgment on a warrant of attorney. The effect of the 81st section of the 6 Geo. 4, c. 16, if it stood by itself, would be to protect all executions, whether before or after an act of bankruptcy had been committed, under which a seizure had been made more than two calendar months before the issuing of the fiat, and where the execution creditor had no notice of the act of bankruptcy. But by the 108th section of the same statute, it is enacted, that "no creditor, having security for his debt, shall receive upon any such security more than a rateable part of such debt, except in respect of any execution or extent, served and levied by seizure upon, or any mortgage of or in lien upon any part of the property of such bankrupt before the bankruptcy." Stopping here, the effect of the 108th section at first sight appears to be, to deprive the execution creditor of the benefit of his execution, unless the seizure has been made before the act of bankruptcy, and, if allowed to override the 81st section, seems to render wholly inoperative the words "notwithstanding any prior act of bankruptcy," in that section; and this apparent inconsistency between the two sections, led some of the Judges, in the case of *Godson v. Sanctuary* (a), to express, in wider terms than were necessary for the decision of that case, an opinion,

(a) 4 B. & Ad. 255; S. C. 1 N. & M. 52.

afforded by the 81st section altered, the expressions of it would not have had any parties, in cases of this nature execution levied by seizure at the date of the commission has been effected by the renders it necessary for the operation of the 108th section respect to its effect on cases statute, and it is our duty if they can, by any mode of together. We must give enacting, that no execution two calendar months before which, but for the prior entitled the execution creditor be defeated by any prior execution creditor had no construction put by the Court, and to a certain extent of the Lord Chancellor of *Perrin* (b), that the 108th is still in operation, and the

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81st section of the 6 Geo. 4, c. 16, the question in each case will be, whether the execution under consideration was one which, but for the prior act of bankruptcy, would have entitled the execution creditor to a preference? This question will be answered by referring to the 108th section. If the execution were completed by sale, before the date of the fiat, the 108th section would have no effect, and the protection to the execution creditor would be complete. If the execution were levied by seizure only, the case would come within the exception of the 108th section, and not be affected by that section, unless it also come within the proviso at the end. Now, the facts of the present case bring it within the terms of the enactment, as well as of the exception and of the proviso, and which, leaving it under the proviso, take it out of the exception, for even if there were no prior act of bankruptcy, there would, under that proviso, be no preference given to the execution creditor, under the 2 & 3 Vict. c. 29. The proviso, in the latter statute, as to warrants of attorney, was evidently intended to cover cases, where the sale, as well as the seizure, took place before the date of the fiat, and which, for the reasons already given, do not come within the 108th section of the former act, and also probably to prevent any inference that might be drawn from the previous provisions, that they were intended to give validity to payments made by way of fraudulent preference, or to executions on judgments obtained by fraudulent preference, and does not offer any objection to the construction put by the Court of Exchequer on the earlier part of the clause. The judgment of the Court below, must, therefore, be affirmed.

Judgment affirmed.

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COOPER v. LANGDON.

To assumpsit on a building agreement, the defendant pleaded non assumpsit, together with a plea, that before breach, the contract was rescinded by mutual agreement: judgment having been entered on both issues for defendant: Held, on error, that there was no inconsistency on the record.

A writ of error was brought upon the judgment entered up in this case (a), and argued by

Peacock, for the plaintiff. The record is inconsistent and repugnant. Upon the first issue it is found, that there was no contract, while the third issue affirms a contract, and finds that it was rescinded by mutual agreement between the parties. There are several cases to shew that judgment cannot be entered up, on an inconsistent finding of the jury, *Cossey v. Diggons* (b), *Marler v. Aycliffe* (c). If the defendant in support of the third issue succeeds in shewing the existence of a contract, he proves the other issue which the plaintiff had failed to establish, and consequently there cannot be a finding of both issues for the defendant. [*Tindal*, C. J.—Suppose the plaintiff should fail in proving the first issue, by reason of the agreement being inadmissible in evidence for want of a stamp; there would nevertheless be a contract which the defendant might shew was rescinded; there is no necessary inconsistency in the finding]. The defendant cannot succeed without proving the contract, and such proof would entitle the plaintiff to a verdict on the first issue. [*Maule*, J.—Suppose the defendant put in a letter from the plaintiff, saying, “I have received yours of yesterday inclosing a 5*l.* note, and in consideration thereof I agree to rescind *all* contracts heretofore made between us]. The jury would have to find the existence of this particular contract, *Atkins v. Owen* (d).

Crowder, contra, was stopped by the Court.

Lord *Denman*, C. J.—Strictly speaking, there is no in-

(a) See the pleadings, *ante*, vol. 1, p. 392, N. S.
(b) 2 B. & Ald. 546.

(c) Cro. Jac. 134.
(d) 2 Ad. & E. 35; S. C. 4 N. & M. 123.

consistency on the record. But I do not see how it is possible to avoid some appearance of inconsistency in the statement of these particular issues. The defendant has a right to say, "the contract alleged in the declaration did not bind me, and even if it did, it has been rescinded by mutual agreement." Since the statute of Anne allows inconsistent pleas to be put upon the record, this objection will always occur. But in reality there is no repugnancy, for, suppose a special verdict, in which a particular instrument is set out for the Court to determine whether it amounted to an agreement or not, if they should think it did not, how would it be inconsistent with their saying that the parties had entered into a mutual agreement to rescind it?

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Judgment affirmed.

COURT OF COMMON PLEAS.

Hilary Term.

IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

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CHANTER v. DICKINSON.

In support of a declaration in assumpsit, for goods sold and delivered, the plaintiff sought to give in evidence an unstamped document, in the following terms: "Send me a license to use two of C. & Co.'s patent furnaces, to be applied to a single plate and cloth boiler, for which I agree to pay Mr. C., or his order, as agreed 25*l.* as a patent right, and which is to include iron works, fire bricks, and labour." *Held*,

that this fell within the description contained in the schedule of the Stamp Act, 55 Geo. c. 184, "Agreement, or minute, or memorandum of an agreement under hand," &c., and was liable to a 1*l.* stamp; and that it did not fall within the exemption of the statute, which applied to a "memorandum, letter, or agreement, made for, or relating to the sale of any goods, wares, or merchandize;" for that, first, it was not a mere proposal for the sale of goods; and, secondly, that the subject matter of the agreement was not mere goods, wares, or merchandize, and that the defendant was therefore entitled to a nonsuit.

CHANNELL, Serjt., shewed cause against a rule nisi, for entering a nonsuit, obtained on behalf of the defendant in this suit. It was an action of assumpsit, brought by the plaintiff to recover from the defendant a sum of 25*l.* alleged to be due in respect of licenses supplied to him to use patent furnace, of which the plaintiff was patentee, and also a like sum for goods sold and delivered. At the trial before *Tindal*, C. J., at the sittings at nisi prius, in London after Michaelmas Term, 1842, the plaintiff proposed to give in evidence a written document, signed by the defendant.

It appeared that the plaintiff, being patentee of various articles, had prepared printed forms of application for such articles, in which were certain blanks left to be filled up. The form as it originally stood, was as follows:

"To Mr.

"Send	a license to use	of Chanter and Co'
patent	to be applied to	for which
		agree

to pay Mr. Chanter or his order, the terms of printed lists hereunto annexed as a patent right

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"Signature,

"Place,

"Date,

"Remarks,

"Engineers' or furnace builders' time to superintend or fix the above orders to be paid six shillings per day; and also expenses, if the distance exceeds three miles."

The document proposed to be given in evidence was a copy of the above printed form, filled up and altered to the following terms:

"To Mr.

"Send me a license to use two of Chanter and Co's. patent furnaces, to be applied to a singe plate and cloth boiler, for which I agree to pay Mr. Chanter or his order as agreed, twenty-five pounds, as a patent right, and which is to include iron works, fire bricks, and labour.

"Signature, Nathaniel Dickinson.

"Place Canal Street, Dye-works.

"Date June 7th, 1842.

"Remarks To be paid for with cash in one month.

"Engineers', or furnace builders' time to superintend or fix the above order, to be paid six shillings per day; and also expenses, if the distance exceeds three miles."

On behalf of the defendant, it was objected that this document could not be received in evidence without a stamp, for that it came within the description contained in the schedule of the 55 Geo. 3, c. 184. "Agreement, or any minute or memorandum of an agreement, under hand only where the matter thereof shall be of the value of 20*l*. or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument," and was liable to a 1*l*. stamp. For the plaintiff it was argued, that the paper came within the exemption of the statute, which applied to a "memorandum,

wares and merchandize, an
emption above quoted. U
Brown (a), was in point. T
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purpose of making bricks, a
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held that the written offer
was admissible in evidence
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that he had rejected it, and
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to in its terms, might still be read without a stamp being attached to it. Secondly, supposing that this was substantially an agreement, it was an agreement for the sale of goods, and therefore exempted. The plaintiff was a person making and selling patent furnaces; a license was mentioned in the instrument produced, but the defendant's order would be satisfied by a delivery of the goods alone, which would afford him a sufficient license to use them. This was not an agreement for the purchase of a right on the part of the defendant to make the furnaces, but only to use those with which the plaintiff was to supply him; and surely, when a vendor sold his goods, though their manufacture was patented, the fact of the sale afforded a sufficient authority to the purchaser to use them, *Minter v. Williams* (a). Taking this to be the true construction of the document, the exemption would arise; or even taking it that the sale of the furnaces mentioned was the primary object of the agreement, the same consequence would ensue. With a view to the latter consideration, the Court would put a liberal construction upon the document. *Meering v. Duke* (b), *Smith v. Cator* (c), *Curry v. Edensor* (d), were cited. Then were the furnaces, "goods, wares and merchandize," within the meaning of the statute? It would be argued that they were fixtures, for that the introduction of the words, "and labour," shewed that they were to be attached to the defendant's premises, and that therefore, they did not come within this description. On this, as well as in the other points of the case, the Court would be disposed to adopt a liberal view, and unless by the absolute and positive terms of the agreement, the conclusion contended for on the other side must be arrived at, the Court would not deprive the plaintiff of the remedy which he sought to obtain, *Marson v. Short* (e), *Hughes v. Breeds* (f), *West Mid-*

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(a) 5 Nev. & M. 647; S. C. 4 Ad. & El. 251.

(b) 2 Man. & Ry. 121.

(c) 2 B. & Ald. 778.

(d) 3 T. R. 524.

(e) 2 Scott, 243; S. C. 2 Bing. N. C. 118.

(f) 2 C. & P. 159.

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Bompas, Serjt., in support
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TINDAL, C. J.—The first question which arises in this case is, whether the document offered in proof is or is not an agreement so as to render it liable to a stamp, within the operation of the 55 Geo. 3, c. 184, for if it was only a proposal to purchase the articles named in it, or simply an order for those articles, it would not require a stamp. But I cannot read this without seeing that it amounts to an agreement; it would seem upon the face of it, as if the parties had met before, or had had some conversation about the matter, or had agreed upon a stipulated sum as the price of the goods, instead of being paid upon a quantum meruit. The paper says, "Send me a license to use two of Chanter and Co's patent furnaces, &c., for which I agree to pay Mr. Chanter, or his order, as agreed, 25*l*." What is that but stating that the defendant has bound himself by an agreement to pay for that which he is to receive, (whether that be a license, or goods sold and to be delivered, we will consider hereafter,) the sum of 25*l*? *Primâ facie* then, the document is one which requires a stamp, and it is for the plaintiff to take his case out of the general rule, and to shew that his case falls within the exemption in the Stamp Act. The exemption is, "memorandum, letter, or agreement, made for, or relating to, the sale of any goods, wares, and merchandize." Now is this an agreement of or relating to, the sale of goods, wares, and merchandize? It appears to me, in the first place, that a portion of that for which the defendant stipulates, is, that he shall have a license to use that which was the subject matter of his order. He says, "send me a license to use two of Chanter and Co's patent furnaces, to be applied to a singe plate, and cloth boiler, for which I agree to pay Mr. Chanter, or his order, as agreed, 25*l*, as a patent right." I cannot see why those words should be left in the agreement, if it were not that the party who was to receive the furnaces, for which he agreed to pay, was to use them as a patent right; that is, if any one of them became dilapidated, he should be at liberty to replace it

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erecting the furnaces, and should be carried into effect by the plaintiff at a stipulated sum, and that the defendant should have the liberty of using the license, according to the manner in which he purchased it from the patentee. The case, therefore, I think, is more than a mere case of the sale of goods, and it falls within the decision of *South v. Finch*, where there was a sale not only of goods, but of goodwill, and the contract was held not to fall within the exemption of the statute. The rule for entering a nonsuit must be made absolute.

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COLTMAN, J.—I am of opinion that this case is entirely free from doubt, for that we cannot look at this agreement without perceiving that it has reference to something which has already passed between the parties or their agents, and that it is an agreement made in furtherance of some previous understanding. Then the question is, does it fall within the exemption of the Stamp Act? I agree that the meaning of that exemption must be taken to apply to agreements, the primary object of which is the sale of goods; but on referring to this document, I cannot help seeing that the primary object expressed in it, is the purchase of a patent right; it is not to buy the patented article merely, but a liberty to make use of the patent machinery. Independently of this, however, I think that my Brother *Channell* has not shewn that this falls within the description “goods, wares, and merchandize,” for that there is work to be done, and that it is rather to be presumed that the article to be supplied, had no existence before the workmen proceeded to work in the defendant’s premises.

ERSKINE, J.—I also am of opinion, that this rule must be made absolute. The act of Parliament requires a stamp upon “every agreement, or any minute or memorandum of an agreement, under hand only, &c., whether the same shall be only evidence of a contract, or obligatory upon the

looking at this paper, it was either intended to be defendant, or that it was intended to be a contract which had been made by the plaintiff. The words shew that it is so, and I think shew that it falls within the act, it cannot be received in evidence as an agreement for the purchase of the premises of the defendant shew that it would require the observations of *Parke, B.*, have had great doubt whether because there the principle of the purchase of goods, and looking at the present case be supplied by the plaintiff's portion of the contract. From looking at the contract plaintiff to shew that the defendant is sufficient to say in this case does. Looking at the whole to this :—" As I cannot register a plan without a license, I will not build such a furnace, if you will e

CRESSWELL, J.—I am entirely of the same opinion. The first point raised by the plaintiff in this case was founded on the authority of *Drant v. Brown*, which is always cited for the purpose of shewing that a mere proposal does not require a stamp. This case, however, does not bear that aspect, because the defendant does not propose to take the furnaces if the plaintiff will send them, but it is an absolute order, and it is expected that it will be acted upon immediately. I cannot adopt the very ingenious view of the document suggested by my Brother *Channell*, that the words “as agreed,” mean that it is an agreed sum in preference to that contained in the printed list, which is struck out; but I think that this expression shews that the agreement was that if the defendant took the furnaces, he was to pay 25*l.* for them, and that the case was the converse of *Drant v. Brown*, and that the document is a written acceptance of a proposal, instead of the proposition itself. Then it is said that it comes within the exemption relating to agreements for the sale of goods and chattels in the Stamp Act, and it was for the plaintiff to bring himself within that exemption. The words of the document, however, I think, import the purchase of a privilege to use the patent article whatever it may be, rather than a mere right to use it until the particular article supplied is worn out, and, probably, that is the true construction of this agreement. But supposing that the sum of 25*l.* is to be paid for the two furnaces, what is there to shew that they are goods? There is no description of them in the document, but it is said that the price of 25*l.* is to include iron-work, fire bricks, and labour. I do not presume that, in ordinary parlance, a furnace would come within the description “chattels,” and still less where such words as these are used in relation to it. I should rather infer from them that it is something which has no independent existence, and that it is created only as being attached to and becoming a portion of the defendant’s freehold.

Rule absolute.

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An affidavit, entitled, "Between S. F., administratrix, &c., plaintiff, and W. L., defendant," is bad; and where an affidavit so entitled, was employed in verification of a plea in abatement, the Court set aside the plea, and only granted leave to the defendant to plead afresh, upon terms of his pleading issuably.

FLETCHER, Administratrix v. LECHMERE.

CHANNELL, Serjt., moved for a rule, calling upon defendant to shew cause why the plea in abatement pleaded by him in this action should not be set aside. The defendant had pleaded a plea in abatement on privilege, as an attorney of the Court of Queen's Bench, which was verified by an affidavit. The plea was entitled "Lechmere, at the suit of Fletcher, administratrix, &c., the affidavit stated the cause to be "Between S. F. Fletcher, administratrix, &c., plaintiff, and William Lechmere, defendant." It was submitted that this was *Poole v. Pembrey* (a) shewed that an affidavit in support of a plea in abatement must strictly agree with the plea. On that ground one objection arose: but *Phillips v. Hutchinson* (b) and *Clark v. Martin* (c) also shewed that the affidavit was badly entitled. In the former case it was held "Phillips, assignee, &c.," was an irregular mode of designating a plaintiff in entitling an affidavit, and in the latter the Court of Exchequer declined to act upon an affidavit which was entitled "William Newton Clark v. George Martin, executor, &c.," without specifying the name of the person of whom the defendant was executor. *St. John v. Cottrell* (d) was like *Phillips v. Hutchinson*, the plea being there styled "assignee" only, and the affidavit was held to be badly entitled.

A rule nisi having been granted,

Bompas, Serjt., on a subsequent day shewed cause. A marginal note to the case of *Clark v. Martin*, which is most like this case, went too far. That was a rule judgment as in case of a nonsuit; the affidavit to which objection was raised was produced in support of the motion, but, at the end of the case, *Parke*, B. observed, " "

(a) *Ante*, vol. 1, p. 693, O. S.

(c) *Ib.* p. 222.

(b) *Ante*, vol. 3, p. 20, O. S.

(d) 3 Taunt. 377.

assignee was more vague than executor, because a party might be assignee in various ways, and that the Master informed him that an affidavit entitled like the present was very common; he, however, advised the defendant to accept the offer of a peremptory undertaking, which was accordingly done." If the plaintiff was right in his objection, he of course would not have given a peremptory undertaking, but would have had the rule discharged; and the effect of that case, therefore, seemed the very reverse of that which was given to it by the reporter. [*Erskine, J.*—The defendant consented to take a peremptory undertaking on the advice of the learned Judge. But if the affidavit was good, why did not the defendant stand upon it, and have his rule made absolute? Because it appears that the reason for not going to trial given by the plaintiff was insufficient. *Cresswell, J.*—It is clear, in my opinion, that *Parke, B.*, advised the defendant to take a peremptory undertaking, because his affidavit was bad.] There was no pretence made here that the plaintiff was misled; it was better that, in such cases, the simplest rule should be adopted, and the Court would not allow a party to obtain an advantage upon a point so wholly beside the merits of the case as the present. The case was analogous to that of an executor, and from the observations of *Parke, B.*, in *Clark v. Martin*, it was clear that such affidavits were very common.

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Channell, contrà, was stopped by the Court.

TINDAL, C. J.—In a case of this description I think we should endeavour to lay down a rule of easy application, and to avoid any decision, the effect of which would be to produce nice and subtle distinctions. I am of opinion that this case is analogous to that of an assignee; I cannot distinguish it in principle from such a case: and in *Phillips v. Hutchinson* it was held, that an affidavit entitled "Phillips

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assignee, &c.," would not do, because an assignee n fill that office in many different capacities; as assignee debtor, or of a bankrupt. So here the plaintiff may very different powers entrusted to her, according as may claim by one right or by another, and for this re I think this affidavit must be held to be badly entitled cannot help observing that the case in the Exchequer, as it goes, is an authority to the same effect. The C there declined to act upon an affidavit, in the title of v the defendant was described as "executor" only. Th in the case of an executor who claims under a will, su description is bad, a multo fortiori, will the descrij "administratrix," who may claim in many different pacities, be insufficient also.

Bompas prayed that the rule should not be made s lute with costs, and that the defendant should have tin plead.

Channell urged that terms should be imposed, that defendant should plead issuably.

TINDAL, C. J.—The four days within which a ple abatement may be pleaded, have now passed by. The fendant, therefore, cannot plead another plea in abatem Let time be granted on the terms of his pleading issua the costs to be costs in the cause.

Rule accordingly (a)

(a) Vide *Free v. White*, ante, vol. 1, p. 586, N. S.

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CORRIGALL v. The LONDON and BLACKWALL RAILWAY
COMPANY.

THIS was an action of debt: the declaration alleged, for that whereas the London and Blackwall Railway, which

The act, 6 &
7 Wm. 4, c.
cxxiii. ["An
act for making

a Railway from the Minories to Blackwall, with branches, to be called the Commercial Railway,"] provides, by section 11, that it shall be lawful for the company thereby created, to treat for the purchase of such lands, &c., as they shall require for the purpose of the railway, and by sect. 22, provides, that for settling all differences, which may arise between the company, and the owners or occupiers of any lands which shall be taken, damaged, or injuriously affected by the making of the railway, if any such person shall not agree with the company as to the amount of the purchase money, or satisfaction, recompense or compensation for tenant's fixtures, goodwill, &c., or if he shall refuse to accept such amount as shall be offered by the company, then, after notice of such non-acceptance, the company shall issue a warrant to the sheriff or sheriffs of the county or city, where the lands in question shall be situate, and if such sheriff or sheriffs, or their under sheriff or under-sheriffs respectively, shall be a shareholder or shareholders in the said company, or in anywise interested in the matters in question, then to any of the coroners of the said county or city, not interested, commanding such sheriff or other person to empannell a jury, who, upon their oaths, shall inquire of and assess, and give a verdict for the sum of money, to be paid for the purchase of such lands, and also the sum of money to be paid by way of satisfaction, &c., for goodwill, &c., or for any injury or damage which shall before that time, have been done or sustained; which satisfaction, &c., for such damage, shall be inquired into and assessed separately and distinctly from the value of the lands. The 2 & 3 Vict. c. xcv. s. 22, enacts, that, in all cases of dispute between the company and parties claiming compensation, wherein the company do not, upon request, submit the matter in dispute to the determination of a jury, then it shall be lawful for the claimant to send a request in writing to the sheriff, &c., according to the tenor of the previous act, which sheriff shall summon and empannell a jury, and proceed in the manner prescribed in the previous act, upon the issuing of the warrant of the company. By section 27 of the former act, it is provided, that where the verdict of a jury shall be given for the same or a greater sum than shall have been previously offered by the company, for the purchase of any lands, or as compensation for any damage or loss sustained in the execution of the act; all the costs, charges, and expenses of the inquisition shall be defrayed by the company, and shall be settled and determined by the sheriff, &c.

In an action of debt, the plaintiff alleged the construction of the railway, and the consequent deterioration in value of his premises; that he gave the necessary notice to the company, but that the company did not treat for the purchase of his interest, nor for the compensation or satisfaction to be made to him for his damages in respect of his goodwill, &c.; that he requested the company to issue a warrant, and submit the matter in dispute to the determination of a jury; that the company did not do so, and that thereupon, the plaintiff sent his request, in writing, to the sheriff of Middlesex, to summon a jury to inquire of the sum of money to be paid for the purchase of his estate, and for compensation; that an inquisition was taken in pursuance thereof, before T. F., and M. G., Esqs., then being sheriff of the county of Middlesex, (wherein the premises were situate); that the jury were duly empannelled; that the plaintiff and defendants appeared by counsel; that the jury found that the plaintiff's house was deteriorated in value by the construction of the railway, and gave their verdict for 250*l.*, to be paid for the purchase of the plaintiff's interest, and also by way of satisfaction for damage; but that the defendants had refused to pay the said sum of 250*l.* Second count, for the costs of the proceedings taken by the plaintiff. Plea, that T. F., Esq., at the time of the request, and of holding the inquisition, &c., was a shareholder in the company, by means whereof, the inquisition, &c., were void. Second plea, that at the inquisition the plaintiff adduced evidence, not only of damage in respect of goodwill, &c., but also in respect of damage to the dwelling-house, by reason of the construction of the railway, and that the verdict of the jury proceeded in respect of both classes of damage, whereby the inquisition was void.

Held, upon demurrer, first, that in the particular case, the fact of one of the persons constituting the office of sheriff, was immaterial; for, that although, in proceedings taken by the company, under the statute, 6 & 7 Wm. 4, c. cxxiii. s. 22, his jurisdiction might have failed by reason of his interest, yet that the proceedings being taken by the claimant, under the 22nd section of the

IN A SESSION OF PARLIAMENT
titled, "An act for extending
between London and Bla
Railway,' and for amending
first opened to the public
whereas the plaintiff here
October, in the year last a
tain term of years, then
for a term of seventy-four
year, from the 29th of
dwelling-house, numbered
certain street, called Lu
Road, in the parish of S
Middlesex, and within fifty
by reason of the construct
dwelling-house, and the est
plaintiff therein, as such l
wit, on the said 24th of
deteriorated in value, and

2 & 3 Vict. c. xcvi., inasmuch as the claimant had not
a shareholder or not, the case did not fall within the
proceedings were, therefore, valid.

Held, secondly, that supposing the proceedings to
gested by the defendants, they had waived the objection
and allowing the inquiry to proceed, and judgment

Held, thirdly, that the mere fact of the reception of
of dwelling-house; secondly, of damage to the ground
of the construction of the railway, did not vitiate the

being, &c., did, within the period of twelve months from the opening of the said railway, as aforesaid, to wit, on the 24th of October, 1840, aforesaid, by notice in writing, bearing date, to wit, the day and year last aforesaid, and left at the office of the said company, to wit, on the 2nd of November, in the year last aforesaid, require the said company to purchase his, the plaintiff's, estate, interest and property, in the said dwelling-house whereof he was so lessee, and interested as aforesaid, and thereby then gave the said company notice that he was ready to treat for the sale of the same to the said company, according to the provisions of the said acts of Parliament made and passed concerning the said railway, and to the said notice the said plaintiff annexed a plan more particularly delineating the said dwelling-house. And the plaintiff saith that the said company did not, nor would, within thirty days after the service of the said notice as aforesaid, treat for the purchase of the estate, interest and property, of him, the said plaintiff, as such lessee as aforesaid, in the said dwelling-house mentioned in the said notice; nor for the compensation, recompense or satisfaction, to be made to him as such lessee as aforesaid, for any loss, damage or injury, in respect of any goodwill, tenant's fixtures, improvements or otherwise, occasioned by the taking thereof, nor did the plaintiff and the said company, within that time, nor afterwards, agree as to the value of the estate, interest and property, of him the plaintiff, as such lessee as aforesaid, in the said dwelling-house, nor as to the amount or value of the satisfaction, recompense or compensation, to be paid to him the plaintiff, as such lessee, for such goodwill, tenant's fixtures, improvements or otherwise, as aforesaid. Whereupon he, the plaintiff, afterwards, and after the expiration of the said thirty days, to wit, on the 29th of December, 1840, did, by a request in writing, then made by him, request the said company to issue a warrant to submit the said matter in dispute between him, the plaintiff, and the said company, of and concerning the premises aforesaid, to the

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Michael Gibbs, at the time of the said request, and then being sheriff of the said county of Middlesex as aforesaid, and being by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said last mentioned request in that behalf mentioned, and thereby referred to be inquired of, assessed and ascertained by them in manner therein mentioned: and the plaintiff and the said company, by their counsel respectively, having, at the time and place of inquisition aforesaid, appeared before the said sheriff and the said jurors, and having respectively adduced evidence before the said sheriff and jurors touching the matters so in question as aforesaid, the said jurors upon their oath said that the said dwelling-house, before the time of such notice to purchase so given as aforesaid, and then still was deteriorated in value, by the construction of the said railway, authorized by the said first-mentioned act; and they the said jurors did then and there assess and give a verdict for the sum of 250/., to be paid by the said company to the plaintiff, for the purchase by them of the said plaintiff of his said estate and interest in the said dwelling-house, and also by way of satisfaction, recompense and compensation, for all damage in respect of the tenant's fixtures of the plaintiff in the said dwelling-house, and in all other respects whatsoever, under the provisions of the said acts in that behalf; and the said plaintiff further says, that the said sheriff did then and there accordingly, pursuant to the said acts, give judgment for the said sum of 250/., so assessed by the said jury, to be paid by the said company to the plaintiff, according to the provisions of the said acts, and the said verdict and judgment were then and there, to wit, at the time and place of holding the said inquisition as aforesaid, duly signed by the said sheriff: and the plaintiff says, that the said verdict and judgment having been so signed by the said sheriff as aforesaid, were afterwards, and before the commencement of this suit, to wit, on the 24th of May, 1841, by the said sheriff, duly deposited,

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that the parish of St. George,
parish as is described in the
Parliament, &c., of all which
then and there, to wit, on th
had notice ; and the plainti
interested as aforesaid in th
said inquisition referred, and
as the person so interested th
the said sum of 250*l*., upon r
ance as heinafter mentioned
wit, in the county of Midd
property not being proper
trustee, or person under dis
mentioned act, incapacitated
mises the said company then
and after the recording of th
and within a reasonable time
commencement of this suit,
last aforesaid, ready, and willi
the said company, and to the
pany, a good title to the sai
inquisition referred, and als
veyance thereof to the said
them of the said sum of 250
sum accordingly, whereof the
tice, but discharged him fro
tender of any such title or c

from the said company of the said sum of 250*l*. for which the said jurors so gave their verdict, and the said sheriff so gave judgment as aforesaid, or any part thereof, although the said company afterwards, and before the commencement of this suit, were requested by the plaintiff to pay him the said sum of money. Whereby, and by reason of the said sum of 250*l*. being and remaining still wholly due and unpaid, an action hath accrued to the plaintiff to demand and have, of and from the said company, the said sum of 250*l*.

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Second count: And whereas, also, after the said inquisition in the first count of this declaration mentioned, to wit, &c., the costs, charges and expenses, of summoning the said jury, and the expenses of witnesses on the said inquisition, were duly settled and determined by the said sheriff, pursuant to the said acts, at a certain sum, to wit, the sum of 110*l*. 1*s*. 11*d*., to be paid by the said company to the plaintiff, who, by reason of the premises in the said first count mentioned, had been prevented from treating and agreeing as aforesaid. Whereof the said company (who, prior to such settlement and determination, had had due notice to attend before the said sheriff on that occasion,) afterwards, to wit, &c., had notice. And the said last mentioned sum of money was then, and more than ten days before the commencement of this suit, duly demanded of the said company by the plaintiff, yet the plaintiff in fact saith, that he hath not yet obtained payment or satisfaction of the said last mentioned sum of money. Whereby, &c.

Pleas; first, that the said Thomas Farncombe, Esq., in the said declaration mentioned, at the time of the said request so made by the plaintiff to the sheriff of Middlesex, to summon a jury for the purposes in the said declaration in that behalf mentioned, and thence continually, until and at the respective times of the holding of the inquisition and giving the judgment in the said first count mentioned, and of the settling and determining the costs, charges and expenses in the said second count mentioned, was, and con-

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tinued to be, a shareholder in the said company, and by means thereof the said inquisition and judgment, and the said settling and determining the said costs, &c., were and are wholly void, and of no force or effect; Verification.

Secondly. That upon the holding of the said inquisition in the said first count of the declaration mentioned, to wit &c., the plaintiff adduced evidence before the said sheriff and jurors, not only of the loss and damage in respect of good will, tenant's fixtures, improvements or otherwise alleged by the plaintiff to have been occasioned by taking the dwelling-house in the declaration mentioned, but also of certain loss and damage alleged by the plaintiff to have been sustained by him in respect of the said dwelling-house by reason of the construction of the said railway, and that the said jurors did assess and give a verdict for the said sum of 250*l.* to be paid by the said company to the plaintiff for the purchase by them of the said plaintiff of his said estate and interest in the said dwelling-house, and also by way of satisfaction, recompense and compensation for the several losses and damages in this plea hereinbefore mentioned. In reason of which said premises the said inquisition and the said verdict and judgment in the said declaration mentioned became and were, and are wholly void and of none effect. Verification.

Demurrer to the first plea, that the said plea neither traverses, nor confesses and avoids the matters alleged in the declaration, and that if the said plea does sufficiently confess and admit the matters alleged in the declaration yet it does not set forth or allege any matters or things which shew that the said inquisition and judgment, and the said settling and determining the said costs, charges and expenses or either of them were or are of no force and effect, that the said inquisition and judgment, and the said settling &c., of the said costs, &c., and each of them were and are good, valid and effectual notwithstanding that the said Thomas Farncombe, Esq., at the several times in the third plea mentioned, was a shareholder in the said company.

that if by the said third plea it was intended to be shewn that the said sheriff to whom the said request was so made, and before whom the said inquisition was holden, &c., was at the several times in the said third plea mentioned, a shareholder in the said company, it should have alleged that both the said Thomas Farncombe, and the said Michael Gibbs, Esquires, at the said several times last mentioned were respectively shareholders, &c., for the said Thomas Farncombe, and Michael Gibbs, Esquires, at the several times last aforesaid, were together sheriff of Middlesex, and not either of them alone: that the said third plea does not therefore shew that the said sheriff was a shareholder in the said company, and the fact of any other person than the said sheriff being at the several times last aforesaid a shareholder in the said company, would not render the said inquisition, &c., void; that the objection to the validity of the said inquisition, &c., by reason of Thomas Farncombe, Esq., being a shareholder in the said company, cannot now be pleaded in bar to the declaration; that it appears by the said inquisition and proceedings, that the said company appeared upon the said inquiry, and took the benefit of the same, and cannot now object that the said Thomas Farncombe was at the time a shareholder, a fact which the company then knew; and for that there is nothing in the acts of Parliament relating to the said company, which makes an inquisition like the present bad, by reason of one or even both of the persons filling the office of sheriff of Middlesex, being a shareholder or shareholders in the said company, and also for that the said plea is in other respects uncertain, informal and insufficient.

Demurrer also to the fourth plea, for that it is not alleged in that plea, that it appears by the record of the said verdict and judgment, that such evidence was adduced as in that plea mentioned, and unless it so appears the said company are estopped from alleging the fact to be so, and that no proof of such fact, except the record itself, can be now given; that it is not alleged that such evidence was received by the

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appears by the record of the
any part of the said sum of
satisfaction, &c., for such loss
that on the contrary it appears
dict and judgment, as set for
said sum of 250*l.* was given
tiff's estate and interest in the
by way of satisfaction, recom-
damages in respect of tenant's
said dwelling-house, and no
provisions of the said acts
whereas the said company, be-
mean to insist that the said
partly given in respect of the
provisions of those acts, which
topped by the said record from
does not appear by the said
first mentioned, was the sanction
tioned in the declaration, and
inquisition therein mentioned.

Joinder.

The following points were
defendants, viz., that the in-
of the personal disability of
alleged in the third plea;
estopped from alleging that
given them by statute in the

defective, because it does not appear therefrom, that the 250*l.* were assessed by the jury, in respect of the amount of the value of the said dwelling-house, and the compensation for loss, damage, or injury, in respect of tenant's fixtures, improvements, or otherwise, occasioned by the taking thereof; but that on the contrary, it expressly appears thereby, that the said sum was assessed in respect of other damages, which fact is admitted to be true by the demurrer to the fourth plea; that the second count of the declaration is defective, because in cases under the 2 & 3 Vict. c. 95, s. 23, (being the enactment under which the plaintiff proceeded,) the sheriff has no power to award or settle costs, nor can the party taking the benefit thereof claim any costs; that an action of debt will not lie either for the 250*l.*, or for the costs (a).

The case was argued on the 11th of November, 1842.

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(a) The following are the provisions of the statute, 6 & 7 Wm. 4, c. cxxiii., which became material, on the discussion of this demurrer:—

Section 11, "That it shall be lawful for the said company to treat and agree for the purchase of any lands authorized to be taken and used by them as aforesaid, and of any subsisting leases, terms, estates, and interests therein, and charges thereon, or such of them, or such part thereof, as the said company shall think proper.

Section 21, "That all and every body or bodies politic, corporate, or collegiate, trustee or trustees, and other person or persons hereinbefore capacitated to contract for, sell and convey any such tenements or hereditaments as aforesaid, or any share or shares, estate or estates, interest

or interests therein, may accept and receive such satisfaction or recompense for the value thereof, and such body or bodies, trustee or trustees, person or persons, owner or owners, and also any tenant or tenants for a year, or from year to year, or at will, or other occupier or occupiers of any such premises, entitled to any compensation for such goodwill or improvements as shall be lost, and for tenant's fixtures, and for such injury or damage, as shall be sustained on account of the execution of this act, or in anywise relating thereto, may accept and receive such sum of money in respect thereof, as shall be agreed upon between them respectively, and the said company; and in case the said company and the said parties interested, &c., cannot or do not agree, as to the amount or value

Section 22, " And for settling a differences which may arise between the said company, and the several owners and occupiers of or persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted. Be it further enacted, that any person, corporation, or trustee so interested or entitled, and capacitated to sell, agree, convey or release as aforesaid, shall not agree with the said company as to the amount of such purchase money or satisfaction, recompense or other compensation, as aforesaid: or if any of the parties entitled to receive such purchase money, &c., shall refuse to accept such purchase money, &c. as shall be offered by the said company, and shall give notice thereof in writing, to the said company, within twenty days next after such offer shall have been made, and the party giving such notice, shall therein request that the matter in dispute may be submitted to the determination

recover, sought to be sustained by the first plea, was, that Mr. Farncombe, one of the persons who constituted the

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or sheriffs of the county or city where the lands in question shall be situate, &c.; and if such sheriff or sheriffs, or their under-sheriff or under-sheriffs, &c., respectively, shall be a shareholder or shareholders in the said company, or enjoy any place of trust or profit under the said company, or shall be in anywise interested in the matter in question, then to any of the coroners of the said county, city, &c., not interested as aforesaid; or if all the coroners shall be so interested, then to some person living within the said county, &c., and free from personal disability, who shall have filled the said office of sheriff, &c., within the said county, &c., (a person having more recently served that office being preferred,) commanding such sheriff or sheriffs, or other person, to empanel, summon, and return, and the said sheriff, &c., is, and are hereby accordingly empowered and required to empanel, summon, and return a jury of at least forty-eight, sufficient and indifferent men, qualified according to the laws of this realm, to serve on juries for trials of issues, in his Majesty's Courts of Record, at Westminster; and the persons so to be empanelled, &c., are hereby required to appear before the said sheriff, under-sheriff, &c., and to attend from day to day, until duly discharged; and out of such persons so to be empanelled, &c., a jury of twelve men shall be drawn by the said

sheriff, under-sheriff, &c., in such manner, as juries for the trials of issues joined in his Majesty's Courts of record at Westminster, are by law directed to be drawn, &c.; and the said sheriff, under-sheriff, &c., &c., is hereby empowered and required on request in writing, by either party, to summon before him all persons who shall be thought necessary to be examined as witnesses touching the matter in question, and may authorize or order the said jury, or any six or more of them to view the place or matter in controversy; and such jury shall, upon their oaths, or being Quakers upon their affirmations, (which oaths and affirmations, as well as the oaths and affirmations of all such persons as shall be called upon to give evidence, the said sheriff, under-sheriff, &c., is hereby empowered and required to administer,) inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein, as shall have been of right purchased by the said company, from any other person, and also the sum of money to be paid by way of satisfaction, recompense, or compensation for goodwill, improvements, tenant's fixtures, or for any injury or damage whatsoever, which shall, before that time, have been done or sustained as aforesaid, and for the future, temporary or perpetual, or for any recurring damages to be so

which cannot or will not be further obviated, removed or repaired by them; which satisfaction, recompense or compensation for such damage or loss shall be inquired into, and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and the said, sheriff, under-sheriff, &c., shall accordingly give judgment for such purchase-money, satisfaction, recompense, or compensation, as shall be assessed by such jury; which said verdict and the judgment thereon, to be pronounced as aforesaid, shall be binding and conclusive to all intents and purposes, upon all persons and corporations whatsoever, &c.

Section 24, "That the said verdicts and judgments being first signed by the said sheriff, under-sheriff, &c., presiding at the taking of such verdict, and pronouncing such judgment respectively, &c., shall be kept by the clerk of the peace for the county, &c., in which the matter in dispute shall have arisen, among the records of the quarter sessions of such county, &c., and shall be

damages and judgment taken before him and his co-sheriff were void. This objection was not tenable, first, because

without Aldgate, London, St. Mary Matfellow, otherwise Whitechapel, St. George in the East, &c., and also close to or adjoining divers dwelling-houses or shops in the said parishes, and it may happen, by reason of the construction thereof, that the said dwelling-houses or shops may be greatly deteriorated in value; be it therefore further enacted, that in case any such dwelling-house or shops which shall be situated within fifty feet from the said railway, shall be deteriorated in value, and the owner or owners, lessee or lessees of any such dwelling-houses or shops within the said parishes, &c., or either of them, shall, by notice in writing to be left at the office of the said company, require the said company to purchase the same, it shall be lawful for the said company, and they are hereby authorized within thirty days after the service of such notice, to treat for the purchase of the dwelling-houses or shops mentioned in such notice, and for the compensation, recompense, or satisfaction to be made to him or them for any loss, damage, or injury in respect of any goodwill, tenant's fixtures, improvements, or otherwise occasioned by the taking thereof; and in case the party so giving such notice, and the said company shall not agree as to the value of such dwelling-houses or shops, or as to the amount or value of the satisfaction, &c., to be paid for such goodwill, &c., then the amount of such satisfaction, &c., shall be

ascertained and settled by the verdict of a jury in the manner hereinbefore described for ascertaining and settling the value or recompense for other lands tenements or hereditaments and premises to be taken or purchased for the purposes of this act. Provided always, That no party shall be entitled to receive any compensation under the above enactment unless the jury, to whom it shall be referred to ascertain the amount thereof, shall, by their verdict, determine that the property in respect of which the same is claimed has been deteriorated in value by the construction of the said railway. Provided also, That no party shall be entitled to claim any such compensation, nor shall the said company be compellable to purchase such property, as aforesaid, after the period of twelve months from the opening of the said railway to the public. Provided always, that in no case shall the said company be compellable to purchase any portion of any dwelling-house or shop, which portion is situate at a greater distance than fifty feet from the said railway. Provided always, That the said company, whenever called on to take part of such dwelling-houses or shops as aforesaid, may, at their option, take the whole, subject to payment of the compensation hereinbefore mentioned."

The following are the material provisions the statute of 2 & 3 Vict. c. xcvi.

Section 18, "And be it further

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the office of sheriff of Middlesex was composed of two persons, one only of whom appeared to be interested. In *Thompson v. Farden (a)*, it was held that a replevin bond may be taken and assigned by one of the sheriffs of London in his own name only. This case was not precisely analogous, for the two sheriffs of London composed the sheriff of Middlesex, but it shewed that the acts of one sheriff were valid in some cases without the actual

enacted, That in all cases where the verdict of a jury, summoned as by the said first recited act, (6 & 7 Wm. 4, c. cxxiii. s. 22), directed, shall be given for the same, or for a greater sum than shall have been previously offered by the said company for the purchase of any land to be used or taken by them for the purposes of the said recited acts (a) or this act, or as compensation for any damage or loss which may happen or arise in the execution of any of the powers thereof, the expenses of instructing and the reasonable fees of counsel, not exceeding two in number, for attending the inquiry before such jury, and the reasonable expenses of one surveyor, which may have been paid by the party with whom the said company may be in dispute, shall be paid by the said company, and the amount of such fees shall be settled and determined by the sheriff, under-sheriff, &c., in like manner as the cost of summoning such jury and other expenses payable by the said company, but upon the same scale of allowance as may for the time being be adopted or allowed by the taxing

officers of her Majesty's Court of Record at Westminster.

Section 22, "That in all case of dispute between the company and the parties claiming compensation from the company under the provisions of the above recited acts and the present act, wherein the company do not, upon request made by such party or parties to submit the matter in dispute to the determination of a jury, within the space of twenty-one days, issue their warrant, according to the regulations of the aforesaid recited acts for the empannelling and summoning a jury, then it shall and may be lawful for the party, having given notice himself, to send a request in writing to the sheriff or sheriffs, or under-sheriffs' bailiff, or his under-bailiff respectively, according to the tenor of the above recited act and the sheriffs, &c., so mentioned in the above recited act, shall summon and empanel a jury and proceed as in the manner prescribed in the above recited act upon the issuing of the warrant of the company."

(a) 1 Scott, N. R. 275; S. C. *Ante*, vol. 8, p. 813, O. S.

(a) 6 & 7 Wm. 4, c. cxxiii; and 1 Vict. c. cxxxiii.

intervention of the other. Mr. Farncombe besides, was not the sheriff of Middlesex, but a part only of the sheriff; and to satisfy the 22nd sect. of the act of 6 & 7 Wm. 4, c. 123, it was necessary that "the sheriff or sheriffs of the county or city where the lands in question shall be situate," should be interested, to render him or them incompetent to hold an inquisition. Secondly, the 22nd sect. of the statute of 6 & 7 Wm. 4, c. 123, contemplated the case of an inquisition at the instance of the company, and not of a claimant against the company. It was intended to enable the company successfully to carry on their works with a view to the public benefit; but it also provided against the possibility of injustice, by enacting that the company should not appeal to one of their own shareholders to determine what should be a fair settlement of a dispute, in which he was himself, to a certain extent, involved. But the 22nd sect. of the 2 & 3 Vict. c. 95, although it contained a provision for the purpose of enabling claimants to adopt a mode of proceeding similar to that previously enacted in favour of the company, contained no mention of the interest of the sheriff; and the reason might be presumed to be the hardship which would arise, if, in a case like the present, where the inquisition had been held at the request of the claimant, the company should be permitted afterwards to turn round, and to render all the proceedings void upon bringing forward a fact, of which the claimant could have no cognizance, namely, the interest of the sheriff. Thirdly, even supposing the objection to be valid, it had been waived, for it was alleged that the company had appeared by counsel, and had submitted to the jurisdiction of the sheriff, and to the verdict of the jury. The first plea was, therefore, bad. As to the second plea, the demurrer, it was submitted, must also prevail. The object of that plea was to show, that the assessment of the jury had included damages, not only in respect of the purchase money, and of the goodwill, tenant's fixtures, and improvements, but also

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inquisition, except by the nothing to shew that the v influenced by such evidenc that it had been adduced a of the deterioration of the v 22nd sect. of the statute of directed to find. [*Coltman* contend that the 22nd se separate assessment in resp fixtures, &c., and for the p point was not raised by th The objection to the declar did not contain such an ave special demurrer. In the c *wich Railway Company v.* company was empowered by making compensation to th same, and for damage occu was enacted, that such compe should be assessed by a . sheriff, on the company's w that upon such assessment should be settled and ascert of the lands. A jury was assess the purchase money

the jury gave a general verdict for 15,000*l*. The Court refused on this ground to grant a mandamus for the sheriff to summon a jury for a new inquiry.

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Bompas, Serjt. (with whom was *Hugh Hill*), for the defendants. First, as to the necessity of a separate assessment of damages. From the pleading, it appeared that there had been but one verdict for one aggregate amount. The 22nd section of the act of Wm. 4, required the jury to "inquire of, and assess and give a verdict for the sum of money to be paid for the purchase of such lands, &c., and also the sum of money to be paid by way of satisfaction, recompense, or compensation for goodwill, improvements, tenant's fixtures, or for any injury or damage whatsoever, which shall before that time have been done or sustained as aforesaid, &c., which satisfaction, recompense, or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid." [*Maule*, J.—The section only contemplates one verdict]. But it required that the assessment should be distinct. [*Erskine*, J.—My Brother *Channell* argues, that for anything that appears by the record, there may have been a separate assessment by the jury among themselves, although their verdict gave but one amount]. No distinction could exist between a verdict and an assessment, and if a separate assessment was required, so also there must be a distinct verdict which must be formally set out upon the record. And it was open to the defendants to take this objection as the record now stood, for the plaintiff was bound to shew in his declaration, that the assessment of damages was good, but this was not sufficiently shewn, and so the objection arose. The jury besides had exceeded the authority given to them by the statute, because they had apparently given damage, not only for the loss and damage for tenant's fixtures, goodwill, &c., and for the value of the house, but for the deterioration of the house as well. The plaintiff's

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claim, however, arose the moment the deterioration commenced, and it was up to that point only that he entitled to demand any damages, and surely he could recover both the value of the deterioration and the ground will. [*Maule, J.*—Suppose a house is worth 2000*l.*, and the erection of a railway, its value is reduced to 500*l.* the company to have it for the 500*l.*] So soon as deterioration began, the party should have quitted house, and he could not make the company pay for damage other than that occasioned by the actual taking of the premises by them. By the first count of the declaration, it clearly appeared that the assessment was in respect not only of the value of the house and the compensation for loss in respect of goodwill, tenant's fixtures, but for other damage occasioned by the taking of the house. Secondly, as to the first plea. This plea was founded on the want of authority of the presiding Judge. It was that where any interest existed, the jurisdiction ceased, and the distinction sought to be sustained between a case where the company was the moving party, and a case where the claimant procured the inquisition to be held, was untenable. The 22nd section of the statute of Wm. 4, distinct in its provisions on this head, and the 22nd section of the statute 2 & 3 Vict. must be taken to apply in the same manner, and with all the exceptions comprised in the previous act. The interest of one of the two persons composing the sheriff of Middlesex, must be taken to vitiate the authority of both, for the act done must be the act of both. Thirdly, the second count of the declaration was bad, for the only provision of either statute which awarded costs, was that contained in the 27th section of the statute of Wm. 4, and that section only referred to cases where the company sought to compel the sale of lands, or the acceptance of satisfaction. The statute of 2 & 3 Vict. which first authorized proceedings by the claimant against the company, contained no provision with regard to costs.

Channell, Serjt., replied. The second count of the declaration was good, for the Legislature could not have intended that the company should recover costs when taking adverse proceedings, and that they should be exempted from costs when they themselves so misconducted themselves as to render proceedings against them necessary. No reason existed for such a distinction, and it must be taken that the right to costs accrued in the same manner as in actions at law.

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Cur. adv. vult.

TINDAL, C. J., on the 28th of January, 1843, delivered the judgment of the Court.—The plaintiff in this case declared in an action of debt, and after stating in his declaration the formation of the railway company by the statute 6 & 7 Wm. 4, he stated that the plaintiff was lessee of certain premises for a certain term of years, which premises were situated within fifty feet of the railway, and that by reason of the construction of the railway his premises had been greatly deteriorated in value: that within the period of twelve months he gave notice in writing, that he was ready to treat for the sale of the same to the company; that the company would not within thirty days after such notice treat for the purchase of his interest, nor for the compensation or satisfaction to be made to him for his loss or damages in respect of his good will, tenant's fixtures, improvements or otherwise, nor agree with him for the value of his interest; that after the expiration of the thirty days he requested the company to issue a warrant and to submit the matter in dispute to the determination of a jury; that the company did not do so within twenty-one days, and that thereupon the plaintiff sent his request in writing to the sheriff of Middlesex to summon a jury to inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of his estate, and for the compensation to be paid to him by the company, for his damage in that behalf. The declaration then avers that the inquisition was

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taken in pursuance thereof, before Thomas Farncombe, and Michael Gibbs, Esqs., then being sheriff of the county of Middlesex, in which county the premises in question were situate; that the jury were duly empannelled; that the plaintiff and the defendants appeared before such jury by their counsel; that the jury found that the dwelling-house of the plaintiff before and at the time of the notice to purchase was deteriorated in value by the construction of the railway, and assessed and gave their verdict for the sum of 250*l.*, to be paid for the purchase by the company of the plaintiff of his said interest and also by way of satisfaction, recompense and compensation for all damages in respect of the tenant's fixtures of the plaintiff in the said dwelling-house, or in all other respects whatsoever; that the said sheriff gave judgment for the said sum so assessed by the jury; that the verdict and judgment were duly signed, and were properly deposited as required by the said act; that the plaintiff was ready to convey and make a good title to the property; of all which premises the defendants had notice, but that the plaintiff had not obtained payment of the said sum of 250*l.* although the said company had been requested to pay; by reason whereof an action had accrued to recover the said sum. The declaration contained a second count for the costs and charges of the proceedings, which the plaintiff had taken under the act. The defendants pleaded, first, that Thomas Farncombe, Esq., at the time of the request so made to the sheriff of Middlesex, and from thence continually to the time of holding the inquisition and giving the judgment, and of settling and determining the costs, &c., was, and continued to be a shareholder in the said company, by means whereof the inquisition and judgment and the determining of such costs, charges and expenses were wholly void. The defendants further pleaded, that at the holding of the said inquisition the plaintiff adduced evidence not only of the loss and damage in respect of goodwill, tenant's fixtures, improvements or otherwise, but also of loss and damage in respect

of the dwelling-house by reason of the construction of the railway, and that the jury assessed and gave their verdict for the said sum of 250*l*. for the purchase of the plaintiff's interest in the dwelling-house, and also by way of satisfaction, recompense and compensation for the several losses and damages in that plea mentioned, by reason whereof the inquisition and judgment were void. To each of these pleas, the plaintiff demurred specially, and the defendants joined in demurrer. With respect to the objection raised by the first of these two pleas, even admitting that the 22nd section of the prior act applies to the case where the office of sheriff is constituted and composed of two persons, as in the sheriffwick of Middlesex, and where one only of such persons is a shareholder, yet we think the present case does not fall within the provisions therein contained. That section contemplated the case where the company issue their warrant to summon a jury, and the sheriff is a shareholder in the company, and, in that case, enacts, that the warrant of the company shall not go to the sheriff, being one of their own shareholders, but to the coroner. It is very reasonable where the company issue a warrant, as they must know beforehand from their own books if the sheriff is a shareholder or not, that they should not be allowed to send their warrant to one of their own body, and thereby, in effect, constitute one of the individuals of whom the company is composed, and who may be presumed to be interested in their favour, to be a judge in their own behalf; but the present case falls within and is governed by the 22nd section of the subsequent act, the 2 & 3 Vict. c. xcvi, being a case in which the company have declined or neglected to issue their warrant within twenty-one days after a request made by the party for that purpose, and in which the claimant is authorized to send his request in writing to the sheriff to summon a jury. The party has no means of knowing whether the sheriff is a shareholder or not, and, accordingly in this clause, there is no provision made in the case of the sheriff being a share-

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time, we think that the objection, if such could have been brought before the sheriff and jury, to proceed and the judgment notwithstanding the objection itself, that the sheriff, interested in the behalf of the defendant, took the objection taken by the defendant in favour, and it would be unnecessary to await the result of the objection until after they had determined whether it was sustained. We, therefore, think that the objection have prevailed, at all events, and the first plea is bad in law. The objection to the inquisition that evidence was taken not only of the loss and damage to the tenant's fixtures, and otherwises to the plaintiff's dwelling-house, but also to the defendant's dwelling-house, but also sustained in respect of the damage to the construction of the railway ; first, that the plaintiff had a right to the land ; and, secondly, that the damage was composed of damages to the plaintiff's grounds of injury. But we

comprises damages given for injury to the premises by the construction of the railway, we think that we must take the inquisition as it is set out on the face of the declaration, which gives a verdict for the sum of 250*l.* for the purchase of the house by the company, and also by way of satisfaction, recompense, and compensation for all damages in respect of the tenant's fixtures of the said plaintiff in the said dwelling-house, or in any other respects whatsoever, thereby excluding any damage given for the deterioration of the house by the original construction of the railway. The objection is then raised that by the 22nd section of the former statute, it is expressly provided that the jury shall assess and give a verdict for the sum to be paid for the purchase of the lands, and also the sum of money to be paid by way of satisfaction, recompense, or compensation for goodwill, &c., and then proceeds, "which satisfaction, recompense, or compensation for such damage or loss, shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid;" and the question is, whether the words just adverted to, are compulsory and in the nature of a condition, so that if they are not observed, the inquisition and subsequent judgment are to be held void, or whether they are directory only, so that the company or the claimant might call on the sheriff to keep the evidence distinct as to the value of the premises, and the satisfaction for damage done, and to find and adjudicate a separate sum in respect of each? We think the words directory only. There are no expressions in the statute which require them to be construed as words of condition, or to shew such intention on the part of the Legislature, and they are not to be construed to avoid the proceedings unless such appears the necessary construction. The Court of King's Bench in *Ex parte Keeton* (a), in a very similar clause of another

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(a) 4 N. & M. 458.

the first count. As to the set-
off for the costs, charges and ex-
penses, it has been duly settled and de-
termined by the acts, at a certain
time, in favor of the plaintiff, who by the
first count mentioned, had been
bound and agreeing for the sale of the
property, and think that the act has not provided
for consideration. The only charge
made, is the 27th section of the act,
which appears to be limited in its operation
to cases where the company are compelling the owner
to accept satisfaction for damages
for three cases,—where the judgment is
greater than that which was
offered; where the verdict of the jury
is greater than that which was
sum; and where, by reason of
any other cause or disability,
any person shall be prevented from
accepting satisfaction. But the present case
falls within either of the classes
mentioned within either of the first two
last, which by the instances specified
comprehend the case of a shareholder
on the ground that the company will
not pay for disability, independent of

altogether silent on the subject of costs, except by words of reference at the end of the section, which words, at most, apply only to the three cases enumerated in the 22nd section of the former act, among which the present case does not fall. We, therefore, think that the plaintiff is entitled to judgment on the first count; and the defendants to the judgment of the Court on the last count of the declaration.

Judgment accordingly.

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THE declaration was in debt for goods sold and delivered and on an account stated. The particulars claimed 8*l*. 18*s*. 8*d*.; pleas, first, never indebted; secondly, as to 8*l*. 18*s*. 8*d*., parcel, &c., that after the defendant became indebted to the plaintiff in the said sum of 8*l*. 18*s*. 8*d*., and before the commencement of this suit, to wit, on the 3rd of March, 1842, the plaintiff then being a prisoner in actual custody within the walls of a certain prison, &c., to wit, the Fleet Prison, upon process at the suit of one Henry Edwards, for the recovery of a certain debt then due from the now plaintiff to the said H. Edwards, did, within fourteen days next after the commencement of the said actual custody of the now plaintiff, to wit, on the day and year last aforesaid, duly and according to the directions and provisions of the 1 & 2 Vict. c. 110, apply by petition,

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By the provisions of the 1 & 2 Vict. c. 110, all debts due to an insolvent down to the time of his final discharge, vest in his assignee, whether due or growing due at the time of his petition or not.

Where to an action for goods sold and delivered, the defendant pleaded, that after the defendant became indebted, and before the commencement of the

suit, the plaintiff petitioned the Insolvent Court for his discharge, under the 1 & 2 Vict. c. 110, and that a vesting order having been made, the debt in question vested in the assignee appointed by the Court; and the replication was, that the plaintiff did not, after the debt became due, petition the said Court, and issue was taken thereon; the Court held the issue to be immaterial; and where upon such an issue, evidence was given at the trial, that the petition by the plaintiff to the Insolvent Court was on the 2nd of March, and his final discharge on the 10th of May, and that the goods were supplied between the 5th of March and the 14th of May, and the jury, under the direction of the Judge, that all debts due to the plaintiff, up to the time of his final discharge, vested in his assignee, found a verdict for the defendant; the Court, upon an application by the plaintiff, to enter a verdict for him, for the sum which he claimed, set aside the verdict, but refused to allow the cause to go down for trial a second time on the immaterial issue raised, and gave the defendant leave to amend his plea, and the plaintiff leave to reply *de novo*, but without costs on either side.

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in a summary way, to the Court for the Relief of Insolvent Debtors, in the said act mentioned, for his discharge from such custody as aforesaid, according to the provision of the said act, in which petition the now plaintiff stated he was willing that all his real and personal estate and effects should be vested in the provisional assignee for the time being of the estate and effects of insolvent debtors in England, according to the provisions of the said act, and prayed to be discharged from custody, and to have full liberty of his person, against the demands for which the now plaintiff was then in custody, and against the demands of all other persons who should be, or claim to be, creditors of the now plaintiff, at the time of the presenting of the said petition, and which said petition was then duly subscribed by the now plaintiff, and was forthwith, to wit, filed of record in the said Court, pursuant to the direction in the said act contained; and the defendant further stated that on the said filing of the said petition, and before the commencement of this suit, to wit, on the day and year last aforesaid, the said Court, in pursuance and according to the said statute, ordered that all the real and personal estate and effects of the now plaintiff, both within the realm and abroad, except, &c., and also all the future estate, right, title, interest, and trust of the now plaintiff in or to any real or personal estate and effects within the realm or abroad, which the now plaintiff might purchase or which might revert, descend, or be devised or bequeathed or come to him before he should become entitled to a final discharge, in pursuance of the said act, and according to the adjudication made in that behalf, or in case the now plaintiff should obtain his full discharge from custody without any adjudication being made by the said Court, that before the now plaintiff should be fully discharged from custody, all debts due or growing due to the now plaintiff or to be due to him, before such discharge as aforesaid should be vested in one Samuel Sturgis, then and there being the provisional assignee, &c., which said order

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then duly entered of record in the said Court, as, &c., and notice of the said order was duly published, according to the directions of the said Court; by virtue of which said order of the Court, so made as aforesaid, and by virtue of the said statute, the said debts and sums of money in the said declaration mentioned, as far as the same relate to the said sum of 8*l.* 18*s.* 8*d.*, parcel, &c., as aforesaid, became and were vested in the said Samuel Sturgis, as assignee, as aforesaid, of the now plaintiff; and the defendant further says, that, after the making of the said vesting order, and before the commencement of this suit, to wit, on the 9th of June, 1842, a certain person, to wit, one Charles Morgan, was duly appointed by the said Court assignee of the estate and effects of the now plaintiff, for the purposes of the said act, and the said Charles Morgan then accepted, and signified to the said Court his acceptance of the said appointment, which said appointment, and the said acceptance thereof, were then respectively entered of record of the said Court, as, &c., and thereupon, by virtue of the said appointment, and the said acceptance thereof by the said C. Morgan, &c., and by virtue of the said statute, the said debts and sums of money in the said declaration mentioned, as far, &c., became, and were, and now are, vested in the said C. Morgan, as such assignee as aforesaid. Verification.

Replication, joining issue on the first plea; as to the second plea, that the plaintiff did not, after the defendant became indebted to the plaintiff in the said sum of 8*l.* 18*s.* 8*d.*, parcel, &c., he, the plaintiff, then being in custody, as in that plea mentioned, apply by petition, in a summary way, to the said Court for the Relief of Insolvent Debtors, for his discharge from such custody, according to the provisions of the said statute, modo et formâ. Conclusion to the country and issue.

The cause was tried before the under-sheriff of the county of Middlesex on the 12th of January, 1843, when it was proved, on behalf of the plaintiff, that certain goods

he was finally discharged.]
the plaintiff claimed a total
credit for 9*l*. 5*s*. 6*d*., leaving
under-sheriff, in summing up
that all debts due to the plain
discharge vested in the assign
for the defendant. Leave w
move to enter a verdict for 8*l*

Channell, Serjt., moved in
upon the defendant to shew
not be entered accordingly, c
be granted on the ground of

Dowling, Serjt., on a sub
The substantial question whic
this action was, that which
sheriff to the jury, namely,
had arisen before the final
the under-sheriff was right in
thought the debt had so arise
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a debt so contracted in the as
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soner, apply by petition in a

to order that all the real and personal estate, and effects of such prisoner, and all the future estate of such prisoner, "and all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid shall be vested in the provisional assignee for the time being," &c. Section 45 empowered the Insolvent Court to appoint a proper person to be assignee of the estate of such prisoner for the purposes of the act, and enacted, that where such assignee should have signified to the Court his acceptance of the appointment, the estate of the prisoner, previously vested in the provisional assignee, should immediately by virtue of such appointment vest in him, in trust for the benefit of the creditors. Section 87 directed, that before adjudication the Court should require such prisoner to execute a warrant of attorney to confess judgment for the amount of debts in his schedule; and that if at any time it shall appear to the satisfaction of the Court that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead, leaving assets, &c., the Court may permit execution to be taken out upon such judgment. Section 88 provided, that where the insolvent shall, after his discharge, become entitled to property which cannot be taken in execution, and shall refuse to assign such property, the assignee may apply to the Court for relief, and the Court may thereupon order the prisoner, notwithstanding his discharge, to be remanded into custody until he transfers such property. It was urged, that upon the construction of these sections of the statute there could be no doubt whatever that every debt due before the final discharge of the prisoner vested in his assignee, and that in the present case, the jury having found that all that was due accrued due before such discharge of the plaintiff, the verdict was right. But the contention on the other side would be, that upon these sections, and sect. 69 of the same statute, the time within which the insolvent's debts vested in the assignee, was limited to the time of the vesting order. Section 69 provided, that every prisoner

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delivering such schedule, o
be stated than those then d
the time of the discharge of
estate vested in his assignee ;
accruing debts were also pr
and 88 already referred to.
this debt, which accrued befo
vested in his assignee. The
was, whether the debt accri
was clearly immaterial, and
the plaintiff to be entitled
defendant must still proceed
the case ; for there was a p
that the debt vested in the a

Channell, in support of
reading the 69th section, the
due at the time of the vestit
for in the schedule, and it v
the assignees. The vesting
the 3rd of March, the first
the 5th. There was nothing
inconsistent with this const
that section, it was provide
petition by such prisoner, it
to order that all the estate of

nothing inconsistent with the general policy of the law in the construction here contended for by the plaintiff, because, if a debt accrued after the vesting order the insolvent might sue for it, and then it would fall within the denomination of estate provided for by ss. 87 and 88, and would pass to the assignee for the benefit of the creditors. [*Cresswell*, J.—But between the vesting order and the final discharge of the insolvent, he had no property at all, and surely any debt then accruing would become due to his assignees, and not to himself. It is difficult to see how any debt could be incurred with him in that interval. *Tindal*, C. J.—Up to the time of his discharge, all the property of an insolvent who has petitioned for his discharge, of whatsoever kind, vests in his assignee. Subsequently to that time it vests in the insolvent, but it is subject to be claimed by the assignee for the benefit of the creditors. The real point here is, whether the goods or any of them, were delivered before the plaintiff's final discharge, or not; and the issue which is raised is immaterial. Can we do anything else but award a repleader?] The plea on the face of it, was unobjectionable; it was a good plea in confession and avoidance, and could not be demurred to. It offered a material issue, namely, whether the plaintiff did, after the debt became due, apply to the Insolvent Court for his discharge. This question, however, had not been left to the jury, and the plaintiff was entitled to have a verdict entered for him for the amount which he claimed.

TINDAL, C. J.—I think that in the abstract, the direction of the under-sheriff was right, for looking at the provisions of the Insolvent Debtors' Act, I think he was right in saying, that all debts due or growing due to the plaintiff up to the time of his discharge, vested in his assignee. But the precise issue which is raised on this record, was not correctly laid before the jury, and the cause on that ground must go down again to be tried. As it is clear, however, that the issue as it stands, must be found for the plaintiff

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against the merits of the case, the defendant will be allowed to amend his plea without costs, and the plaintiff may then reply anew. This rule shall be made absolute without costs, either of the rule, or of the former trial.

Rule accordingly.

WITHERS v. SPOONER.

Where the affidavit in support of a motion for judgment as in case of a nonsuit, did not disclose whether the cause was of town or country origin, and if it were a country cause, the motion would have been too soon, the Court discharged the rule.

Held also, that the motion could not be subsequently renewed upon

DOWLING, Serjt., shewed cause against a rule obtained on behalf of the defendant, for judgment as in case of a nonsuit. The affidavit on which the rule had been moved, did not state whether this was a town or a country cause. Issue appeared to have been joined on the 30th of May, 1842, which was in Trinity Term, and if this were a town cause, the defendant would be entitled, no doubt, to come to the Court with this motion in the present Term; but if it were a country cause, he was too soon with his application. The rule had been distinctly laid down by the Court of Exchequer, in Trinity Term, 1842, in a case of *Heeles v. Kidd (a)*, that in country causes where issue is joined in or in the Vacation before an issuable term, a motion for judgment as in case of a nonsuit cannot be made until after the lapse of two assizes. Here it was not shown that

Manning, Serjt., in support of the rule. The presumption was as strong in favour of the cause being a town cause, as of its being a country cause. Besides the Court would look at its own proceedings, and although, as the cause progressed, the various steps were not now entered of record as they used to be, the Court would still take judicial notice of what was done within their own jurisdiction.

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TINDAL, C. J.—According to the strict rule, the defendant is bound to bring before the Court the proper materials to support his application. He has not done so, and as the proceedings are not now entered of record as the cause goes on, we cannot look to the roll to see where the cause is. The rule must be discharged.

Dowling asked for costs.

Manning. The point had never been raised before, and the affidavit was in the ordinary form. The Court, therefore, would not visit the defendant with costs.

TINDAL, C. J.—The defendant could have had no difficulty in saying whether this was a town or a country cause; but as the point is a new one, the costs may be costs in the cause.

Rule discharged accordingly.

On a subsequent day *Manning* obtained a fresh rule, on an affidavit, which stated that the venue was in the county of Middlesex.

Dowling shewed cause. It was the duty of the defendant to have come prepared, in the first instance, with perfect materials. As he had failed to do so, the Court would not allow him to renew his application. He cited *Regina v.*

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Manning, contra, urged that the case was one in which the Court, seeing that the defendant was right in his original application, would not prevent him from obtaining that to which he was entitled, by reason of a defect of so trivial a character as that on which the objection had arisen.

TINDAL, C. J.—I think the objection to this motion must prevail. The rule must be discharged, the costs to be costs in the cause.

Rule discharged.

(a) *Ante*, vol. 8, p. 323, O. S.

(c) *Ante*, vol. 1, p. 792, N. S.

(b) *Ib.* p. 652.

ALEXANDER v. TOWNLEY.

To a declaration on four bills of exchange drawn by the plaintiff and accepted by the defendant : Plea, that before the ac-

THE declaration was in assumpsit, upon four bills of exchange drawn by the plaintiff upon the defendant, and accepted by him, and also contained a count on an account stated between them. The defendant pleaded, that heretofore and before the accruing of the several causes of

cruing of the causes of action, on the 30th of October, 1809, a commission of bankruptcy had issued against the plaintiff, that proceeding had been had thereon, that the plaintiff obtained his certificate on the 5th of December, 1810, but that his estate had not paid 15s. in the pound; that on the 31st of October, 1817, the plaintiff had petitioned the Insolvent Court, and that on the 17th of December, in the same year, he had been adjudged to be entitled to the benefit of the Insolvent Act, but that his estate had not paid 15s. in the pound: that on the 10th of November, 1821, a commission of bankruptcy had issued against the plaintiff, that he obtained his certificate of conformity on the 26th of March, 1822, but that his estate had not produced 15s. in the pound; that on the 23rd of February, 1824, a commission of bankruptcy had issued against the plaintiff, under which he obtained his certificate on the 19th of April, 1824, and that his estate had not produced 15s. in the pound; that on the 19th of December, 1836, a fiat in bankruptcy had issued against the plaintiff, and that he finished his examination on the 20th of April, 1837, but that his estate had not produced 15s. in the pound; and that on the 26th of July, 1837, the plaintiff petitioned the Insolvent Court, and was declared to be entitled to the benefit of the Act on the 6th of November, 1837, and that his estate did not produce 15s. in the pound: *Held*, upon demurrer, that the plea was double, and therefore bad; and the Court refused to allow the defendant leave to plead several pleas, but gave leave to amend, on payment of costs.

action in the declaration mentioned, to wit, on the 30th of October, 1809, and from thence continually until the suing out of the commission of bankrupt hereinafter mentioned, the plaintiff was a broker and a trader within and according and subject to the laws and statutes then in force concerning bankrupts, and during all that time did exercise the trade of a broker, and sought his living by buying and selling; and the said plaintiff so exercising the said trade, and being such trader, and seeking his living as aforesaid, on the day and year aforesaid, became and was indebted to one Aaron Norton in the sum of 100*l.* and upwards, and was also indebted to other persons in other large sums of money; and the said plaintiff being so indebted as aforesaid, and so exercising the said trade and being such trader, and seeking his living as aforesaid, afterwards, to wit, on the day and year aforesaid, the said debt to the said Aaron Norton and the said other debts being then unpaid, became and was bankrupt within the true intent and meaning of the several statutes and laws then in force concerning bankrupts, and, thereupon, afterwards, to wit, on the day and year aforesaid, a commission of bankruptcy, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the day and year aforesaid, grounded upon the petition of the said Aaron Norton, was duly awarded and issued against the said plaintiff, directed to certain commissioners therein named, that is to say, to Henry Stebbing, &c., by which said commission, our Lord the late King George the Third did name, assign, appoint, constitute, and ordain them, the said Henry Stebbing, &c., his special commissioners, thereby giving full power and authority to the said commissioners, four or three of them, to proceed according to the statutes in the said commission specified, and all other statutes then in force concerning bankrupts, not only concerning the said plaintiff, his body, lands, tenements, freehold and customary goods, debts, and all other things whatsoever, but also concerning all other persons, who by concealment, claim, or otherwise, did or

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should offend touching the mission specified, or any part or intent and meaning of the said commission, the said Lord the late King George the Fourth, commanded the said commission, to proceed in the execution of the said commission, according to the said statutes, with and by the said commission, re will more fully appear, by virtue and by force of the statutes that rupts, the major part of the said commission having severally taken the oath appointed to be bankrupts, according to the case made and provided, and kept a memorandum thereof as the said commission, afterwards, in the year aforesaid, that the said plaintiff had been true intent and meaning of concerning bankrupts, before the said commission, and did then to be a bankrupt accordingly, as saith, that on the said 25th of aforesaid, due notice was given in the *Gazette*, that such commission and issued forth against the said plaintiff, and been declared and adjudged required to surrender himself; as saith, that the several meeting the said plaintiff to surrender and discovery of his estate and elimination under the said commission of the statutes then in force in the said plaintiff duly surrendered himself to the said commissioners, in and

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named and authorized, and submitted himself to be from time to time examined touching the discovery of his estate and effects, and at the last of the said meetings, to wit, on the 6th of January, 1810, finished his examination upon oath before the major part of the said commissioners; and the said plaintiff afterwards, to wit, on the 5th of December, 1810, duly obtained his certificate of conformity under the said commission, according to the statutes then in force concerning bankrupts, which said certificate afterwards, to wit, on the day and year last aforesaid, was duly allowed and confirmed by the Right Hon. John Earl of Eldon, then being Lord High Chancellor of Great Britain, according to the form of the statutes then in force in that behalf; nevertheless the defendant says, that the estate of the said plaintiff under the said commission did not produce, nor hath it as yet produced, sufficient to pay every creditor under the said commission 15s. in the pound, on the amount of their several debts proved or to be proved under the said commission; and the said defendant further saith, that afterwards, and after the issuing of the said commission of bankruptcy as hereinbefore in this plea mentioned, and before the accruing of the said several causes of action in the said declaration mentioned, to wit, on the 31st of October, 1817, the said plaintiff was actually a prisoner in the custody of the Marshal of the Marshalsea of our Lord the late King George the Third, at the suit of one Robert Wardell and others his creditors, within the meaning of a certain act of Parliament made and passed in the 53rd year of the reign of his late Majesty King George the Third, entitled, "An Act for the relief of Insolvent Debtors in England," and did, according to the directions and provisions of that act, apply by petition in a summary way to the Court for relief of Insolvent Debtors, for his discharge from such custody as aforesaid, according to the provisions of the said act, which said petition was duly subscribed by the said plaintiff, and was forthwith afterwards, to wit, on the 17th of November, 1817, filed in

in that case made and provide
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Insolvent Debtors, being of o
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plaintiff was by the said order
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said Robert Wardell, and othe
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every creditor from whose d
discharged as aforesaid, 15s. i

rupt as hereinafter next mentioned, the said plaintiff was a coachmaster, dealer, and chapman, and a trader within and according and subject to the laws and statutes then in force concerning bankrupts, and during all that time did exercise the trade of a coachmaster, dealer, and chapman, and sought his living by buying and selling, and the said plaintiff so, &c., on the day and year last aforesaid, became and was indebted to one Robert Henbrey, in the sum of 100*l.* and upwards, and the said plaintiff was also indebted to other persons in other large sums of money, and the said plaintiff, being so indebted, &c., became and was a bankrupt, &c., and thereupon afterwards, to wit, on the day and year last aforesaid, a commission of bankruptcy, &c. was duly awarded and issued against the said plaintiff, &c.; and the said defendant further saith, that afterwards, to wit, on the 8th of December, in the year last aforesaid, James Harberd, of the New Inn, Old Bailey, in the city of London, book-keeper, was duly chosen assignee of the estate and effects of the said plaintiff by the creditors, who had proved their debts under the said last-mentioned commission, and afterwards on the day and year last aforesaid, the major part of the last-mentioned commissioners assigned to the said James Harberd, all the then present and future personal estate of the said plaintiff, for the benefit of the creditors of the said plaintiff; and although the said plaintiff duly surrendered himself to the major part of the said commissioners in the last-mentioned commission, named and submitted himself to be examined touching the discovery of his estate and effects and duly conformed himself to the statutes then in force concerning bankrupts, and although the said plaintiff, afterwards, to wit, on the 26th of March, 1822, duly obtained his certificate of conformity under the last-mentioned commission, nevertheless the said defendant says, that the estate of the plaintiff under the last-mentioned commission did not produce, nor hath it as yet produced sufficient to pay to every creditor under the said last-mentioned commission 15*s.* in the pound, on the

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&c., was issued against the part of the commissioners named in the form of law, did afterwards, &c. that the plaintiff had become bankrupt on the 31st of March, 1824, the said Lewis Abrahams, &c., were directed to sell the estate and effects of the said plaintiff, and had proved their debts and the commissioners, afterwards, to wit Henry Browning and Lewis Abrahams, did assign the plaintiff for the benefit of his creditors, although the plaintiff, on the 1st of April, 1824, obtained his certificate, his estate was not sufficient to pay his debts of one pound; that afterwards, on the 1st of May, 1824, the plaintiff being a horse-dealer and trader, &c., as such trader on the 1st of December, became and was indebted in 100*l.* and upwards, and being so indebted, &c. and continuing so indebted, &c. and thereupon afterwards, on the 1st of December, 1836, the Right Honourable Lord High Chancellor, then being Lord High Chancellor, upon reading the petition made by the plaintiff, White, &c., duly made out a decree under his hand and seal

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the said fiat, and the statute, &c., J. S. M. Fonblanque, Esq. then being a commissioner, &c., afterwards, to wit, on the 20th of December, 1836, did in due form of law find and adjudge, that the said plaintiff had become bankrupt, &c., that before and at the time of the said adjudication one A. B. Belcher, was, and from thence hitherto has been and still is one of the official assignees of the said Court of Bankruptcy; that afterwards, to wit, on the said 20th of December, 1836, the said J. S. M. Fonblanque, Esq., by writing under his hand appointed the said A. B. Belcher, to be the official assignee of the estate and effects of the plaintiff under the said fiat, to act with the assignee or assignees to be chosen by the creditors of the said bankrupt; averment of notice in the *London Gazette*, of the surrender of the bankrupt, of the appointment of Thomas White as co-assignee, of the several meetings under the fiat, but that although the plaintiff on the 20th of April, 1837, finished his examination upon oath before the said commissioners, and made a full discovery and disclosure of his estate and effects, yet that the estate of the plaintiff under the said fiat did not then produce, nor hath it yet produced sufficient to pay every creditor under the said fiat 15s. in the pound, on the amount of their several debts: That afterwards, on the 26th of July, 1837, the plaintiff being a prisoner actually within the walls of the Marshalsea, upon process for a certain debt at the suit of Lewis Abrahams, and Abraham Abrahams, did duly and according to the provisions of the 7 Geo. 4, c. 16, apply by petition in a summary way to the Court for the relief of Insolvent Debtors for his discharge from such custody as aforesaid, which said petition was duly subscribed by the plaintiff, and was forthwith afterwards filed in the said Court; that the plaintiff did at the time of subscribing the said petition duly execute a conveyance and assignment to one S. Sturgis, then being the provisional assignee of the said Court, of, amongst other things all the estate, right, title and interest in and to all the real and personal estate, &c., effects of

discharged by virtue of the s
the said debt of the said L.
and from other debts and c
specified in that order; that
the said discharge, assignme
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missions of bankrupt against
ruptcy against the plaintiff,
him for his discharge as an in
which his estate is alleged n
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under, or in consequence of
petitions; whereas it would
to the plaintiff's action if the
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any previous one of the said petitions, and the proceedings thereupon respectively. For that the defendant endeavours to embarrass the plaintiff by stating and relying on many matters unnecessarily, to wit, several commissions, one fiat, and several petitions, and the proceedings thereunder or thereupon, whereas some of those matters would afford a defence to the action; and the plaintiff is perplexed thereby as on the one hand by the rules of pleading he cannot deny the whole of the said plea, and on the other hand he cannot traverse or reply to a part of the said plea without admitting matters which would of themselves be an answer to an action: for that the said plea does not confine the defence to some one or two of the said proceedings, in bankruptcy and in the Court for relief of Insolvent Debtors, in the said plea mentioned; for that the plea is uncertain, in not shewing to which of the proceedings in the plea mentioned the defendant means more particularly to point his defence, and does not shew in whom, or whether in any persons, in lieu of the plaintiff, the right to sue in respect of the causes of action in the declaration is vested; for that the plea is ambiguous, in not shewing and stating upon what commission or commissions, or fiat, or other proceeding or proceedings in particular the defendant relies, but leaves it to the plaintiff to conjecture and suppose what is the precise defence, and in what persons, and under which of the said proceedings the defendant means to contend that he has an answer to the action; for that the defendant ought to have shewn that there were, or was, at the time of the commencement of this suit, some persons or person in whom the right to sue on the said bills, and for the causes of action declared on had vested; and the said plea should have expressly alleged that the same, or some of them, had so vested, and so have given the plaintiff an opportunity of answering such averment, for that it ought to have shewn that an assignee or assignees was or were appointed, and, at the time of the commencement of this suit, in existence under the first mentioned commission; for that

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the defendant is estopped from stating and relying on the facts set forth in the plea, as he has by accepting the said bills, and stating the said account declared on, conclusively admitted the plaintiff's competency to draw the said bills, and to state an account; for that it is not now competent for the defendant to deny the validity of the drawing of the said bills, or the said statement of account, or the right of the plaintiff to sue in respect thereof; for that the plea is bad for not shewing that at the time of the accruing of the causes of action in the declaration mentioned, or at the time of accepting the said bills, the defendant had no notice of the matters and things which are in, and by his said plea averred. There were several other causes of demurrer arising upon the exact terms of the plea, which, however, became immaterial upon argument, and to which it is thought unnecessary now to refer.

Channell, Serjt., in support of the demurrer. The plea, if good at all, could only be supported upon the ground, that admitting the contract in fact, it shewed that the right of action was vested in some person who was not the plaintiff, and who did not sue. All the allegations of the bankruptcy and insolvency of the plaintiff, were introduced thus:—"Heretofore and before the accruing of the several causes of action in the declaration mentioned." Those causes of action arose by reason of the defendant not paying the bills which he had accepted, but there was no statement that any of the proceedings in bankruptcy or insolvency had taken place between the drawing of the bills, and the time of their acceptance, or between their acceptance and their falling due; there was no statement that any of the assignees of the plaintiff had interposed with respect to the plaintiff's right to sue, and the plaintiff was entitled to take it, therefore, that the bills had been accepted by the defendant, after the bankruptcy of the plaintiff. In this point of view, the plea afforded no answer to the suit, for the defendant was estopped from setting up any disability

on the part of the plaintiff, which had existed at the time of the acceptance. *Pitt v. Chappelow* (a) was an authority on this point. But, secondly, the effect of the plea, as it now stood, was to embarrass the plaintiff; for he could not know on which of the bankruptcies or insolvencies the defendant meant to rely. *Wright v. Watts* (b) was in point, and shewed, that in order to raise such an objection, it was not requisite that the plea should contain two defences well pleaded, but that, if several defences were set up, and it was uncertain on which reliance would be placed, and the plaintiff was thereby embarrassed, the plea was bad. In the present case, it was no answer to say, that inasmuch as any two commissioners would be a sufficient defence, the rest might be rejected; it was not for the plaintiff to construe the defendant's pleading, and if he was left in uncertainty, that was enough. The plaintiff had a right to know in which set of assignees the defendant meant to contend that the right of action was vested. *Till v. Wilson* (c), *Nelson v. Cherrill* (d), were cited.

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Bompas, Serjt., in support of the plea. The statement of immaterial matter in a plea, had no effect in making that plea double. The defendant was entitled to assume that the plaintiff was perfectly acquainted with the law, and it was as competent to him, as to the defendant to know how much of the allegations in the plea, afforded a sufficient answer to the suit. The circumstances alleged were fully within the plaintiff's own knowledge. [*Tindal*, C. J.—But how does the plaintiff know on which of them the defendant means to rely? *Cresswell*, J.—You say, in effect, that under one bankruptcy, the property is vested in A.; under another, in B. Surely those are separate defences?] The effect of the whole plea was, to shew that

(a) 8 M. & W. 616.

(d) 1 Mo. & Sco. 452; 8 Bing.

(b) 2 G. & Dav. 386.

316. Vide also 7 Bing. 663; S.

(c) 7 B. & C. 684; S. C. 1 Man.

C. 5 M. & P. 680.

& Ry. 580.

defendant has put on the r
distinguish it from the c
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tiff, the Court held that it
was as well answered by c
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that the defendant may no

Bompas asked for leave
pleas.

Channell contended that

TINDAL, C. J.—The de
matter he will rely. He n

(a) 3 N. & P. 585;
(b) 3 P. & D. 317;

CLARIDGE

The rule of

TALFOURD. Serit.. sh

cution issued and executed, on the ground of irregularity, and for the discharge of the defendant out of custody. The irregularity complained of was, that the defendant had had no notice of the taxation of costs; but it was submitted that the application was too late. The judgment had been signed in April, 1842, and the defendant had been in custody since the month of May in the same year. The fact of the defendant being in custody made no difference, but rather made the argument against her stronger. *Robertson v. Douglas* (a), *Primrose v. Baddeley* (b).

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v.
M'KENZIE.

Bompas, Serjt., in support of the rule. Where the party seeking to take advantage of an irregularity was a prisoner, the Court would not construe the practice, which required the application to be made without loss of time, so strictly as in other cases. *Taylor v. Slater* (c). [*Cresswell*, J.—The rule (H. T., 2 Wm. 4, r. 33,) (d) runs thus: “No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time,” &c. In *Chitt. Archb.* p. 1045, it is laid down that this rule applies as well to the case of a prisoner as of another person.] To construe the rule as applicable to the case of a prisoner, was extremely hard, because the longer the imprisonment continued, the greater injustice was done. [*Erskine*, J.—But a prisoner has notice of the irregularity every day of his confinement]. But by her confinement she was prevented from coming to the Court.

TINDAL, C. J.—We cannot admit the argument advanced on behalf of the defendant, that because she is a prisoner, she is entitled to greater favour than any other person, and that, for the same reason, she has been prevented from coming to the Court. She might have been

(a) 1 T. R. 191.

Rock v. Johnson, ante, vol. 4, p.

(b) *Ante*, vol. 2, p. 350, O. S.; 405, O. S.

S. C. 2 Cr. & M. 468.

(d) *Ante*, vol. 1, p. 187, O. S.

(c) 2 Scott, 839; Vide also

ment of the defendant, for
set of persons, and another
application, I think, was made.

ERSKINE, J., concurred.

CRESSWELL, J.—If a judgment
with all its consequences;
not. The Court, in order to
bring themselves within the
jurisdiction, shall be made within a
month; and whether it has
been done here; and whether
it is allowed by a levy of the goods
of the defendant, we can do
nothing of our granting this application
the plaintiff of his remedy.

WEBB

Where the
venue in an
action was
originally laid
in Bristol, but
upon the ap-
plication of the
defendant, on
the usual affidavit, it was changed to Berks, and the

ATCHERLEY, Serjt.,
the plaintiff to shew cause
the 11th of August, 1842, in
an action of assumpsit, and

month of May, 1841, the venue being laid in the county of the city of Bristol. Upon the application of the defendant, and on the usual affidavit, the venue was changed to the county of Berks: two attempts were made by the plaintiff to procure the venue to be restored to Bristol, but without success, and at length the cause stood for trial at Abingdon, at the Summer Assizes, 1842. An action of ejectment, in which the same parties were interested, also stood for trial at the same time. By reason of the pressure of business, however, neither cause was tried, and they were made remanets. An application was then made to *Coleridge, J.*, at Chambers, by the plaintiff, that the venue should be again changed, either to Bristol, Gloucester or Middlesex, on the ground that one Goodchild was an important and material witness in the cause, and that he was in a dangerous state of health, and that it was apprehended that he would not live long enough to give evidence at the trial at the next assizes. This application was opposed by the defendant, but on the 11th of August, the learned Judge made an order, directing the venue to be changed to Middlesex, and imposing upon the plaintiff the terms, that he should at all events pay the additional costs to be incurred by the defendant, by reason of the trial being had in Middlesex instead of Berks. The object of the present motion was to rescind this order, the effect of which would be, that the venue would be again restored to the latter county, and the ground on which it was made was, that Goodchild, the witness, having died before any trial could be had, the reason for the action being speedily tried had been removed, and the defendant was entitled to have it tried at Reading, where the next assizes would be held, and within nine miles of which place the cause of action arose, and all the witnesses resided.

Manning, Serjt., now shewed cause. The affidavits disclosed the fact, that although the witnesses lived within nine miles of Reading, the locality of their residence was

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 W F B B
 v.
 BULKELEY.

reason for the change back granted this motion, it would be granted, it was sworn, had been farming, in which he had been engaged, and the Court would impose upon him his liability for costs.

Atcherley, in support of the

TINDAL, C. J.—The order is a proper and just order at the time, and the witness whose evidence it is, is then ill, and might die before the trial, and the reason which bears against it exists, and the case, therefore, is in the same position in which it was when the order was made, and it is proper and reasonable that a good cause exists to the contrary. It is tried in Berkshire, where it is tried, and however, the plaintiff has a right to be tried there, therefore, I think that if any objection is taken to the venue being taken back to the place where it was first tried, they must pay them.

ERSKINE and CRESSWELL.

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PARDOE v. TERRETT.

TALFOURD, Serjt., shewed cause against a rule for setting aside a writ of distringas. The ground on which the rule had been obtained was, that the calls alleged to have been made at the residence of the defendant, with a view to serve the writ of summons, had not in reality been made. The learned Serjeant, having contended against the sufficiency of the affidavits negating the facts of the calls, objected that the affidavits upon which this rule had been obtained were defective. They were the joint affidavits of Joseph Price, and Anna Maria Price, and the jurat was as follows:—"Sworn at Clare, in the county of Suffolk, the 23rd day of January, 1843, being read over to and fully understood by the said Joseph Price, and Anna Maria Price, before me, &c., a commissioner, &c., (the marks of J. Price, and A. M. Price)." It was objected that there was no sufficient statement that both deponents were sworn, nor were the marks of the deponents certified.

Where a rule had been obtained upon the joint affidavit of two deponents, sworn before a commissioner, the jurat of which was in the following terms, "Sworn at C., the 23rd of January, 1843, being read over to, and fully understood by the said J. A. and A. M. A., before me, &c., a commissioner," &c.; the Court held the jurat informal, on the ground that it did not appear that both deponents had been sworn; and discharged the rule, on the ground of such informality.

Dowling, Serjt., in support of the rule, urged that it was incompetent to the other side to take this objection after having shewed cause upon the merits; and that such shewing cause operated as a waiver. From the body of the affidavits, it appeared that both parties stated facts, and coupling this with the jurat, it could not be doubted that both had been sworn.

TINDAL, C. J.—I think that the jurat is clearly defective, for it may be quite consistent with it, that only one deponent was sworn. Perjury could not be assigned upon such an affidavit.

Rule discharged, the costs to be costs in the cause.



Bompas, Serjt., in support

TINDAL, C. J.—The ten Geo. 3, (a), are “upon every or before any commissioner more deponents, the names of the affidavit shall be written *Fasson* (b), the Court expressed should be strictly observed.

(a) 7 T. R. 82.

(b)

WILLIAMS

The Court will not assent to an application on the part of the *defendant* against a sheriff to return a writ of ca. sa. issued against him, unless he shew some

ANDREWS, Serjt., move that a side-bar rule obtained the sheriff of Surrey to return this action, should be discharged he moved disclosed the following October, 1842, a writ of ca. sa.

18s. 8d. for the costs of the writ, &c., and incidental expenses was issued; that on the 14th of November, the defendant was arrested under the writ, and paid into the hands of the sheriff, under protest, upon the ground that the writ had been improperly executed upon him, whilst he was on his way to this Court (a), the sum of 15l. 12s. 2d.; that on the 16th of November, the defendant obtained a rule in this Court, calling upon the plaintiff to shew cause why he should not refund the sum so paid by him, and that on the 23rd of November that rule was made absolute, the term being imposed upon the defendant, that he should bring no action; that on the 29th of November, the plaintiff was served with a copy of the rule absolute; that on the 25th of November, the defendant obtained a side-bar rule, calling upon the sheriff to return the writ of ca. sa.; that on the 29th, the plaintiff took out a summons at Chambers, to discharge the side-bar rule, and that on the following day (the 30th) an order was made by *Erskine, J.*, enlarging the time for the sheriff to return the writ until the present Term; that on the 2nd of December, the plaintiff repaid to the defendant the sum directed to be paid by the rule of this Court of the 23rd of November, and that the defendant thereupon tendered the sum of 13l. 13s. 10d., as being the amount due under the judgment, and upon the writ of ca. sa.; that the plaintiff refused to accept that sum, claiming a further amount in respect of interest and costs; and that the amount due to the plaintiff under the judgment had not been paid. It was now contended, first, that the writ remained unexecuted, for that the defendant had not tendered a sufficient sum to satisfy the writ; and secondly, that it was incompetent for the defendant to come to the Court with such an application.

Manning, Serjt., contra, urged that the defendant having tendered all that was indorsed on the writ, had complied

(a) *Ante*, p. 660.

the 43 Geo. 3, c. 71; the she nor paid the money into C
sious of leaving the money i
the action, and to pay in 10l.
the 7 & 8 Geo. 4, c. 71; and
defendant, for a rule, calling
writ, *Patteson*, J., granted a
to return the writ, or to b
saying, "I do not see why t
liberty to rule the sheriff to
plaintiff." [*Maule*, J.—This
principle there adopted. Be
s. 2, it is provided, that "a
tested on the day on which
made returnable immediate
This writ cannot be said to h

TINDAL, C. J.—When a d
application, he is bound to
stances to justify it. The defe
taken to bring no action in re
what can be his object in see
returned. Circumstances m
defendant may come with suc
has been executed, and was

But if we granted this application on the grounds on which it is sought to be sustained, there is hardly any case in which we could refuse a similar motion.

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 WILLIAMS
 v.
 WEBB.

MAULE, J.—The defendant, in fact, has no interest or right to interfere in the matter. If we were to grant his rule, the plaintiff might be thereby disabled from obtaining the fruits of his execution.

Rule absolute, for discharging the side-bar rule.

—◆—
 BADMAN v. PUGH.

TINDAL, C. J., on the 24th of November, delivered judgment in this case. He said, this was a rule obtained by my Brother *Wilde*, calling upon the defendant to shew cause why an order of my Brother *Coleridge*, dated the 14th of July last, and a rule of Court, dated the 16th of the same month, and the writ of *fi. fa.* issued in this cause, should not respectively be set aside for irregularity, and

The plaintiff declared in *assumpsit*, and the declaration contained four counts; the defendant pleaded non-*assumpsit* to the last three counts, and to the first count delivered a

special demurrer; the defendant having eventually obtained judgment on the demurrer, an order was granted to him, that he should be at liberty to add pleas of payment and set-off; the pleas were delivered, but bore no date, and were not signed by counsel; the plaintiff thereupon signed interlocutory judgment for want of a plea, and delivered a notice of inquiry of damages: *Held*, that such judgment was irregular, for that even supposing the two pleas of payment and set-off to have been nullities, the unobjectionable plea of the general issue still remained untried upon the record.

A Judge's order for setting aside a judgment signed by the plaintiff for want of a plea, was obtained on the 14th of July, (in Vacation,) and by the order it was directed, that the costs of the application should be paid by the plaintiff; on the 16th of July, the costs were taxed, and the Master's allocatur indorsed on the order; on the same day, a rule was drawn up, as of Trinity Term, 5 Vict., but dated of the 16th of July, which recited, in terms, the Judge's order of the 14th, and made that order a rule of Court, and further directed, that the plaintiff should pay the costs of the application for that rule: The costs of the rule were taxed on the 18th of July, and on the same day the defendant issued a writ of *fi. fa.*, to levy 9*l.* 6*s.* 8*d.*, being the amount of costs taxed on the Judge's order, and also on the rule of Court, such writ being in the form, No. 8, directed by the Reg. Gen., H. T., 2 Vict., to be used on an order of Court for the payment of money: *Held*, first, that the rule was regular, in making the Judge's order a rule of Court, as of T. T., although such order was dated and granted in Vacation; and, secondly, that the writ of *fi. fa.* issued on such rule, was invalid, and that the form of writ which should have been adopted, was No. 9, Reg. Gen., H. T., 2 Vict., described to be a writ of *fi. fa.* on an order of Court, for the payment of money and costs; for that the costs of making the Judge's order a rule of Court, were not yet ascertained at the time of making such rule, and that those costs should therefore have been distinguished from the previous costs under the Judge's order, and the taxation should have been separately stated, according to the terms of such last-named form.

standing, that on the 10th of
assumpsit in this action v
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ant delivered a special den
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18th, the demurrer to th
Judge's order, as frivolous,
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payment by the plaintiff, t
to sign judgment for want
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defendant signed judgme
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Judge's order, that he sho
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already pleaded to the
having been made a rule
set-off were in due time d
of Court, but the pleas
not signed by counsel on

summons for setting aside this judgment on the last three counts, and on the 14th of July, the order mentioned in the rule nisi was made by my Brother *Coleridge*, ordering that the judgment so signed by the plaintiff on the 7th of July be set aside, with costs to be taxed, to be paid by the plaintiff to the defendant, his attorney, or agent. Mr. Pitcher's affidavit then proceeds to state, that on the 16th of July, the costs of setting aside the judgment of the 7th were taxed, and allowed by the Master at the sum of 6*l.* 5*s.* That that sum was on the same day demanded of the plaintiff's attorney, who declined to pay it, on the ground of his not having at that time received any instructions from his client for that purpose, and that no other demand had ever been made of payment of such costs. That afterwards, on the same 16th of July, the rule of Court now sought to be set aside was drawn up, which rule, entitled as of Trinity Term, 5 Vict., but dated Saturday 16th of July, after reciting verbatim the order of my Brother *Coleridge*, dated 14th of July, makes that order a rule of Court, and further orders that the plaintiff should pay to the defendant or his attorney, the costs of and occasioned by that application to the Court, to be taxed by one of the Masters of the Court. The affidavit then states, that the costs of that application and rule were afterwards taxed, but that no notice of such taxation had ever been given to the plaintiff's attorney; that on the 18th of July, a writ of fieri facias was sued out by the defendant, directed to the sheriff of Middlesex, which was in this form: "We command you, that of the goods and chattels of Henry Badman in your bailiwick, you cause to be made 9*l.* 6*s.* 8*d.*, which lately in our Court, before our justices at Westminster, by rule of our said Court, entitled 'Trinity Term, in the fifth year of the reign of Queen Victoria, Badman *against* Pugh, Saturday, 16th of July,' were, by the said Court, ordered to be paid by the said Henry Badman to the said John Pugh, and that of the said goods and chattels of the said Henry Badman in your bailiwick, you further cause

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costs of trying, and an affidavit further states, that were never demanded of the part of the sum of 9*l*. 6*s*. 8*d*. and the indorsement thereon the sheriff seized the plaintiff on the 23rd, an application by my Brother *Coleridge* at Chancery Court, and the writ of fieri facias. That upon such order that upon payment by the plaintiff within the week, to abide the event, that all proceedings under the writ be stayed until the fifth day of the next Term. And the affidavit that a sum of 15*l*. was paid into Chancery and drew the execution pursuant to the rule, and the managing clerk of the defendants read the affidavit by Mr. Hardwen, and read for the defendant; in which it is stated, which, as the defendant waives the objection of the plea, and in which it is sworn to the appointment to tax had been

fieri facias. Upon these affidavits my Brother *Wilde* was compelled to abandon that part of his rule that asked for the payment of the 15*l*. out of Court, and also to relinquish his objection that no notice to tax the costs under the rule of Court had been given to the plaintiff. But he still insisted, first, that the interlocutory judgment signed on the 7th of July, for want of a plea to the three last counts of the declaration, was regular, and therefore, that the order of my Brother *Coleridge*, of the 14th of July, setting that judgment aside, and all the subsequent proceedings, ought to be set aside by the Court. Secondly, that even if the judgment was irregular, and my Brother *Coleridge's* order right, that the rule of Court was irregular and ought to be set aside; first, because the order having been made in Vacation, the rule of Court ought to have been entitled as of the next succeeding Term; that if properly entitled, as of the preceding Term, it could have no effect as a judgment of that Term, to warrant the issue of the *fieri facias* in the Vacation; and lastly, he objected that the *fieri facias* itself and the levy under it were irregular; first, on the ground that as the effect given to rules of Court for the payment of money or costs, was intended as a substitute for the remedy by attachment, a personal demand of the costs ought to have been made upon the plaintiff before execution was issued. Secondly, that the writ of *fieri facias* was not in the form prescribed by the rules of all the Courts, framed under the statute 1 & 2 Vict. c. 110. Thirdly, that the indorsement to levy expenses of the writ and sheriff's poundage was erroneous and rendered the writ itself bad. And lastly, that at all events the levy of the expenses of the writ and sheriff's poundage was irregular, and ought therefore to be set aside. It will be necessary to consider each of these grounds of objection in their order. As to the first objection, on the ground of the irregularity of the judgment, it was contended, on the part of the plaintiff, that the judgment signed on the 7th of July for want of a plea to the three last counts of the

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sons before urged (on which, I
can be held to avoid the objection.
issue. We are, therefore, obliged
signed by the plaintiff was irregular.
Brother *Coleridge* ought not to
jection is as to the sufficiency of
is entitled of Trinity Term, and
and after reciting the order of
the 14th of July, makes that clear
the objection is, that the rule
and bad, because it affects the
14th of July, the effect of a judgment
preceding Trinity Term. And
was cited, as an authority, and
given to it. Upon reference to
it always has been the practice of
officer to draw up, and deliver
Court making the orders and
rules of Court as of the present
practice appears to have been
Court of Exchequer. But in
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been made a rule of Court, and
the ground of the incongruity
serving that the practice of

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Term. The practice was, nevertheless, still continued in this Court, and has since been sanctioned and established by a general rule of all the Courts, made by the Judges in Hilary Term, 1 Vict. (a), under the provisions of the stat. 3 & 4 Wm. 4, c. 42, s. 1, whereby it is ordered, that every rule of Court delivered out in Vacation, shall be dated the day of the month and week on which the same is delivered out, but shall be entitled as of the Term immediately preceding such Vacation. The rule, therefore, has been drawn up according to the form prescribed to the officers by this general rule. And we see no reason why this form should not be adopted in cases like the present, where it is sought to enforce the payment of costs under a Judge's order, as well as in the ordinary cases of rules to plead several measures, or rules to compute which by reference to the title of the Term, would (since the new practice of dating the summons and pleadings) in very many cases appear to have been prematurely made, but which are placed in their proper order by reference to the date inserted according to the general rule. The insertion of that date protects the parties from any undue use of the title of the Term, while the party entitled to the payment is enabled to avail himself of the more speedy remedy provided by the statute 1 & 2 Vict. c. 110, and the incongruity is in substance removed by shewing the real day when the rule of Court was drawn up, and from which it commences its practical operation. We think, therefore, that the rule of Court was properly drawn up, and warranted the issuing, in Vacation, of a writ of fieri facias to enforce the payment of the costs awarded. The remaining objections relate to the regularity of issuing the fi. fa. and the levy under it, but although several objections have been raised against them, it will be unnecessary to consider any other than that which relates to its form, upon which objection we agree that the writ of fieri facias is irregular, and must be set aside. The objection, in

(a) *Ante*, vol. 6, p. 394, O. S.: 3 M. & W. 154. Jerv. Rules, 153.



No. 9, expressly points out how the costs of the rule are to be stated on the face of the writ, making the date of the taxation the period from which the interest is to commence, we must assume that the Judges considered that statement material, and a matter of substance, so as to make the total omission of it an irregularity at least. It is true, that in this case the date from which the interest is to be calculated, is in fact the date of the taxation of the costs of the rule, and is, therefore, the correct date, but there is nothing on the face of the writ, to shew such date; and to hold this writ sufficient, would be in effect to hold, that the form No. 9 is altogether superfluous, and that in all cases even where the costs of the rule are included in the levy, the form No. 8, will be sufficient. We are, therefore, of opinion, that so much of the rule as seeks to set aside the writ, and the levy under it, should be made absolute; and as it becomes unnecessary in consequence, to say anything about the two remaining objections to the indorsement of the writ, and the levy, the rest of the rule will of course be discharged. But we think that the best conclusion to this harassing proceeding, would be, for the defendant to take by consent a rule, that on payment of the costs of this application, and refunding the costs of the writ, and sheriff's poundage within one week, the defendant should be at liberty to amend the writ, by substituting the sum of 6*l.* 5*s.* 0*d.*, for the 9*l.* 6*s.* 8*d.* at the commencement of the writ, and adding the clause for the costs of the rule, as prescribed by form No. 9, and at the same time omitting the costs of the writ and the sheriff's poundage in the indorsement, the plaintiff undertaking to bring no action; otherwise the rule must be made absolute for setting aside the writ, and levy under it.

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Sir *Thomas Wilde*, Serjt., argued in support of the rule.

Channell, Serjt., shewed cause.

Rule accordingly.

money with interest, but did not specify the day from which it was claimed that the interest should run, the Court granted a distringas to compel appearance upon the usual affidavit, leaving it to the defendant to raise objection to the regularity of the writ.

there being a process on the writ of summons the plaintiff claims 50*l.* for a day from which the interest is stated. This was an issue the defendant might tender to the plaintiff, at all events.

TINDAL, C. J.—The case is in peril. Probably the defendant will set aside the writ of summons and proceed in the usual mode of proceeding.

(a) Vide *Coppelo v. Bompas*, ante, vol. 3, p. 166, O. S.; 1 C., M. & R. 575.

RAPHAEL v.

The plaintiff declared in case, and alleged that the

defendants were common carriers, and had received goods from the plaintiff at Birmingham, and there to be delivered for reasons of safety and security to carry and deliver the goods, and delivering the same had long since elapsed, and did not deliver the goods to the plaintiff, and that

BOMPAS, Serjt., has been appointed as plaintiff to shew cause why

in this action. The plaintiff declared in case: and the declaration stated that the defendants were common carriers of goods for hire, and that the plaintiff delivered to them as such carriers, and the defendants received from him, divers goods of the plaintiff to be carried for hire by the defendants, from London to Birmingham, and there to be delivered by the defendants to the plaintiff, for reward to the defendants, and it then became and was the duty of the defendants safely and securely to carry and convey and deliver the said goods as aforesaid: that a reasonable time had elapsed for the defendants to have carried and conveyed and delivered the said goods as aforesaid before the commencement of this suit, yet that the defendants, neglecting their duty, did not safely or securely carry or convey the said goods from London to Birmingham, aforesaid, nor at Birmingham, aforesaid, safely or securely delivered the same for the plaintiff, but so negligently and improperly conducted themselves in that behalf, that by and through the negligence, and in default of the defendants in the premises, the said goods then became, and were, and are wholly lost to the plaintiff. The defendants pleaded, first, not guilty; secondly, that the plaintiff did not deliver to the defendants, nor did the defendants receive from the plaintiff, the goods of the plaintiff in manner and form as in the declaration alleged. Issue was joined upon these pleas, and the cause went down for trial before *Tindal*, C. J., at the sittings in London, after Michaelmas Term, 1842. From the evidence it appeared, that on the 8th of August, 1841, a parcel containing quills was delivered to the defendants at their place of business in London, addressed to the plaintiff at "Mr. Myers's, Green Man, Edgebaston Street, Birmingham." In the ordinary course the parcel would have been delivered on the 10th of August, but although inquiries were made for it, both at Birmingham and in London at the offices of the defendants, it could not be found. The plaintiff had purchased the quills with a view to their exportation to Montreal, in pursuance of a contract, and

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 v.
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 and Others.

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He cited *Bonafous v. Walker* (a), *Gardiner v. Croasdale* (b), and *Davis v. Chapman* (c).

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and Others.

Bompas, Serjt., in support of the rule. The issue taken was merely upon the safe and secure delivery of the goods, and the allegation that they were safely and securely delivered, was satisfied by proof that they were delivered before the commencement of the suit. The plaintiff, no doubt, might have recovered damages for their non-delivery within a reasonable time, but that issue was not raised in the present case, for the loss of the parcel, and its non-delivery in a reasonable time, were perfectly distinct grounds of action. In *Golden v. Manning* (d), the first count of the declaration was for negligence, for not taking care to carry goods, and to deliver the same, the second count was for not carrying and delivering the goods in a reasonable time, the third count was for non-delivery in a reasonable time, with a breach of the promise and undertaking; and this was the form of declaration which should have been here adopted.

Cur. adv. vult.

TINDAL, C. J.—This case was tried before me at Guildhall, at the sitting after last Michaelmas Term. The declaration, which was in case, alleged that the defendants were common carriers, and that the plaintiff delivered to them, and they received certain goods of the plaintiff, to be carried for him from London to Birmingham, and there to be delivered to the plaintiff for reasonable hire and reward; and then averred that it was the duty of the defendants safely and securely to carry and deliver the said goods as aforesaid, but that although a reasonable time for carrying and delivering the goods as aforesaid had long since elapsed, yet the defendants neglecting their duty in

(a) 2 T. R. 126.

(b) 2 Burr. 904.

(c) *Ante*, vol. 9, p. 645, O. S.;

S. C. 3 Scott's N. R. 238 ;

2 Man. & Gr. 921.

(d) 3 Wils. 429.



carry and deliver the parcel, and then to have averred as a breach that the defendants had not delivered the parcel within a reasonable time; and we were referred to the case of *Golden v. Manning and Another* (a), where the declaration contained three counts; the first, like that under discussion; the second, in the form which my Brother *Bompas* contended, as I have already stated, this ought to have followed; and a third, alleging a promise to deliver in a reasonable time, and a breach, like the breach in the present declaration; and it was said, that before the new rules of pleading, counts for not delivering within a reasonable time were usually added to the general count. But no authority was cited to shew that this was necessary, and there is nothing in the case in 3rd *Wilson*, either by way of argument at the Bar, or dictum from the Bench upon the subject; and if the practice before the New Rules were to be taken as affording a safe guide as to the necessity of such a count, it would lead to the conclusion that a plaintiff could not recover upon a common indebitatus count for goods sold and delivered, or upon the general count for work and labour where no price was agreed, because in former days the pleaders always added counts upon the quantum valebant and quantum meruit. In the absence of all authority, therefore, we must examine the argument as presented to us, and in so doing we must keep in mind that we are not discussing a question of pleading upon a special demurrer, but simply ascertaining whether the allegations in the declaration are supported by the evidence, and we will consider, first, the allegation of the defendants' duty; and, secondly, the allegation of the breach. It is not denied, that if the action had been brought for the total loss of the parcel, and the evidence had shewn that it had never been delivered, that the plaintiff would have been entitled to recover upon the de-

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(a) 3 Wils. 429.

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and Others.

claration as now framed ; and if so, then it necessarily follows that the evidence given as to the contract and duty of the defendants, would prove the duty as laid. Neither could it be denied, that if it had been alleged to be the defendants' duty to deliver within a reasonable time, the same evidence would have been sufficient to support that allegation ; the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon a promise or duty to deliver generally. No valid objection, therefore, exists to the proof of the duty as alleged. Whether such allegation would have been good upon special demurrer, if the only breach had been the non-delivery within a reasonable time is another question not material to our present inquiry. But it is said there is no such breach alleged in this declaration, and yet that is the only breach supported by the evidence. But we think that the breach in this declaration, may be read as, in effect, stating that the defendants did not within a reasonable time, nor at any time afterwards, deliver the goods to the plaintiff, but that by the defendants' negligence, they became wholly lost to the plaintiff. And if the breach had been so in form, it would have been sufficient for the plaintiff to prove so much of the breach as would support his right of action, and as the onus of proving the delivery would rest upon the defendants, unless they proved a delivery within a reasonable time, the plaintiff's right of action, and, therefore, the breach alleged would be established. We are, therefore, of opinion that the plaintiff is entitled to retain his verdict, and that this rule must be discharged.

Rule discharged.

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Doe dem. BOWER v. ROE.

BOMPAS, Serjt., moved for judgment against the casual ejector. The tenant in possession of the premises in dispute was an attorney, and service of the declaration and notice in the suit had been effected upon his clerk, who had stated himself to be ready to accept service on behalf of his master.

Where the tenant in possession of the premises in dispute in an action of ejectment, was an attorney, the Court granted a rule for judgment against the casual ejector, upon an affidavit of the service of the declaration, and notice upon his clerk, who stated himself ready to accept service for his employer.

TINDAL, C. J.—There is a fair presumption that the clerk would know what he was about. You may take a rule.

Rule granted (a).

(a) Vide *Doe dem. Duke of Portland v. Roe*, ante, vol. 1, p. 183, N. S.

GRANT v. MOSER.

THE declaration stated that the defendant heretofore, to wit, on the 9th day of April, A. D. 1842, with force and arms &c., made an assault upon the plaintiff, and then seized and laid hold of him, and with great force and violence pulled and dragged him, and forced and compelled him to go as a prisoner and in custody into, through, and along divers public streets and highways to a prison and police station, and there then imprisoned the plaintiff, and detained him in prison for a long time, to wit, for twenty-four hours then next following, and until the plaintiff, in order to obtain his discharge from such custody, was, afterwards, to wit, on the 10th day of April, in the year afore-

To a declaration in trespass for assault and false imprisonment, the defendant pleaded, that the plaintiff with force and arms came to the door of the dwelling-house of the plaintiff, and did with great force and violence, attempt and endeavour forcibly to enter the said dwelling-house, and

there, with great force and violence, wilfully and wantonly rang the door-bell, then having no lawful occasion to go into the said dwelling-house, and then made a great noise and disturbance before and at the door of the said dwelling-house, to the great annoyance of the defendant, and against the peace of our Lady the Queen, whereupon the defendant, in order to preserve the peace, gave charge of the plaintiff to a certain policeman: *Held*, on demurrer, that the plea was bad, for that it contained no sufficient allegation of a breach of the peace having been committed, nor any statement that a breach of the peace was anticipated or apprehended.

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to wit, ten pounds in and
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the said charge, and the
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he brings suit, &c.

Third plea: as to the
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action thereof against him, because he says, that before and at the same time when, &c., the defendant was lawfully possessed of a certain dwelling-house, to wit, the said dwelling-house, situate in the parish of St. Mary-le-bone, in the county of Middlesex, and known as No. 63, Mortimer Street, Cavendish Square, in the said parish as aforesaid, and the defendant being so possessed thereof, the plaintiff, just before the said time when, &c., with force and arms, &c., came to the door of the said dwelling-house, and did then, with great force and violence, attempt and endeavour forcibly to enter the said dwelling-house of the defendant, without the leave or license, and against the will of the defendant, and there with great force and violence, wilfully and wantonly rang the door bell of the said dwelling-house of the defendant, the said plaintiff then having no lawful occasion to go into the said dwelling-house of the defendant, and having no lawful occasion to speak to or converse with any person then being in the said dwelling-house of the defendant, and having no right to demand entrance into the said dwelling-house of the defendant, and then made a great noise and disturbance before and at the door of the said dwelling-house of the defendant, to the great annoyance and disturbance of the defendant and his family, and against the peace of our Lady the Queen, whereupon the defendant then requested the plaintiff to cease ringing the said door bell of the said dwelling-house, and to cease and discontinue making such noise and disturbance as aforesaid, which he the plaintiff then wholly refused to do, and continued making the said noise and disturbance, and so with force and violence, wilfully and wantonly ringing at the door bell of the said dwelling-house of the defendant as aforesaid, without any lawful excuse for so doing, for a long space of time, to wit, for the space of one hour, whereupon the defendant, in order to preserve the peace, and restore good order and tranquillity in his said house, then gave charge of the plaintiff to a certain policeman, to wit, &c., then being a con-

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peace of our Lady the Queen; and also, for that it does not appear, in or by the said last plea, that either the defendant or the said police constable saw or had view, or heard the said noise, disturbance, or ringing, &c.

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Bompas, Serjt., in support of the demurrer. The plea was bad, for that it was consistent with all its allegations, that no breach of the peace had been committed which justified the imprisonment of the plaintiff, or that the act complained of had ceased, and that no breach of the peace was anticipated. The interference of a police constable was only justified where he witnessed a breach of the peace, or where he had reason to apprehend the commission of such an offence. *Timothy v. Simpson* (a), and *Ingle v. Bell* (b), were distinguishable, because in both those cases, there was an allegation that the interference of the police was necessary to prevent a continuance or a repetition of a breach of the peace. *Cohen v. Huskisson* (c), was also cited.

Talfourd, Serjt. (*Baldwin* was with him), in support of the plea. It was obvious, on reading the plea, that a breach of the peace was substantially alleged. The acts charged were stated to have been done with "force and violence," and it was said that the defendant had given the plaintiff into custody "in order to preserve the peace." And besides these there were the general allegations common in indictments, "with force and arms," and "against the peace of our Lady the Queen." Viewing these statements together, it was clear that a breach of the peace was intended to be stated. *Baynes v. Brewster* (d) was referred to.

Bompas, in reply, was stopped by the Court.

(a) 1 C., M. & R. 757

(c) 2 M. & W. 477.

(b) 1 M. & W. 516.

(d) 1 Gale & Dav. 669.

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COURT OF QUEEN'S BENCH.

Easter Term.

IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

PRECEDENCE OF MOTION.

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ON the last day of Easter Term, the presiding Judge, (having gone through the Bar according to the practice observed on the last day of Term, namely, beginning with junior barristers on the back row, and so advancing to the front row), commenced the second round of motions by calling upon *R. V. Richards*, who was the senior Queen's Counsel present, to move, and he moved accordingly in *Rayment v. Smith*, to make a rule absolute.

It is the practice of this Court, on the last day of Term, that the junior barrister, seated on the back row, shall be called upon to move first, both on the first and second rounds of motions.

Pashley, who sat in the back row, objected that the learned Judge, according to the practice, ought to call upon gentlemen in the back row to move a second time, for that the object of the rule of practice was, not merely to afford junior barristers an opportunity of moving unopposed rules, but also of moving rules against which cause was to be shewn; and urged that as opposed rules were not heard on the first motion, this practice became nugatory, unless the back rows were allowed precedence a second time.

R. V. Richards, maintained that he was entitled to the motion; but

W. J. Alexander, who was to shew cause, sat in the

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jury box, and urged that he was at all events in a position to be heard at once, his seat being junior to that of Mr. *Pashley*.

COLERIDGE, J., allowed the case to proceed, and during the argument, sent to the full Court, in order to ascertain the opinion of the rest of the Judges. He subsequently stated, that the other Judges gave it as their opinion that the practice was to begin with motions in the back row a second time.

The same rule was acted upon by *Wightman*, J., on the last day of Trinity Term.

DAVIES v. WATKINS.

Where a defendant was arrested on a ca. sa., issued upon a judgment recovered by default, on the 5th of April; it was held too late to apply to set aside the writ on the 25th of April, upon the

PASHLEY had obtained a rule, calling upon the plaintiff in this action to shew cause why the writ of ca. sa. issued against the defendant should not be set aside, on the ground of irregularity, and why the defendant should not be discharged out of custody. The irregularity complained of, was the omission of any addition of the defendant in the writ; and it was also sworn that, in point of fact, the person in custody was not the real defendant in

in the writ of *capias*; for the Reg. Gen., H. T., 2 & 3 Geo. 4 (a), required that the indorsement on the writ should be of the place of abode and addition of the defendant, "or such other description," as the plaintiff's attorney may be able to give. It might be, that the attorney could give no description; at all events the writ was not a nullity by reason of any omission of such description. *Bettyes v. Thompson* (b) shewed that a defendant might be described of his last known place of abode, where his present residence could not be discovered; and *Clarke v. Palmer* (c) shewed that the rule was not imperative, and that the Court would not always interpose to set a writ aside on account of such an irregularity. But, secondly, the defendant was too late in coming to the Court: after his arrest, twenty days intervened before his application; for he had been taken in execution on the 5th of April, and he had applied only on the 25th. Upon the objection that the defendant was not the person who ought to have been sued, this rule must also be discharged, for there was a valid judgment against him, and he had admitted his liability by suffering such judgment by default.

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Pashley, *contra*. The want of indorsement of the writ could not be waived by the defendant, nor had it been so waived, for the defendant being a prisoner, the Court would not look with the same strictness upon his application as upon that of another person. He was besides an illiterate man, and wholly unacquainted with the nature of legal proceedings. [*Wightman*, J.—He has got an attorney, who appears to have written to the plaintiff on the 8th of April, surely he must have discovered the irregularity in time to have come sooner to the Court. You give no reason for the delay]. Under the circumstances, the delay

(a) 5 B. & Ald. 560; 1 D. & Ry. 471. (c) 9 B. & C. 153; S. C. 4 M. & Ry. 141.

(b) *Ante*, vol. 7, p. 322, O. S.

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was not unreasonable, and the Court would not lose sight of the fact that the defendant was not really liable.

WIGHTMAN, J.—I cannot take it that the party in custody is not the right man, because he has allowed proceedings to go against him, and has suffered judgment by default, thereby admitting his liability in the action. If he really was not the right person, why did he not defend the action? I think, however, that his application, *prima facie*, comes too late, there can be no distinction drawn between the case of a prisoner and that of another person. He should either have come to the Court earlier, or should have accounted for the delay which has arisen.

Rule discharged, with costs.

LEVI v. COYLE.

Where money is paid into Court to abide the event of an interpleader issue, the application by the successful party to obtain the payment of

THIS was a rule, calling upon Mr. Lane, the claimant under an Interpleader rule in this suit, to shew cause why a sum of 100*l.* paid into Court, to abide the event of an Interpleader issue, should not be paid out of Court to the plaintiff.

success. It was submitted, that the motion ought to have been made in the original cause of *Levi v. Coyle*, for that the issue was only directed to inform the Court of what should be done in respect of the money levied in that action.

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v.
COYLE.

J. Jervis, in support of the rule.

WIGHTMAN, J.—The objection is fatal, the rule must be discharged, but without costs.

Rule discharged accordingly.

J. Jervis, then shewed cause against a rule obtained by the defendant Coyle, for setting aside a warrant of attorney, together with the judgment and execution thereon, upon the alleged ground of usury. He produced an affidavit, in which it was stated, that a similar rule had been already obtained, and having been argued in the full Court, was discharged. The ground on which that rule has been disposed of, was, that the applicant had produced no verified copy of the warrant of attorney; the affidavits in support of this application were exactly similar to those before relied on, except that a copy of the warrant of attorney was now produced and verified. It was contended, that this case fell within the rule, that a party shall not come to the Court, a second time, with the same application, founded upon the same materials, where the first motion has been rejected, upon the ground that the materials were imperfect. He cited *Regina v. Pickles* (a).

Corrie, in support of the rule. In *Shaw v. Perkin* (b), a rule for setting aside a writ of fi. fa. was discharged, upon the ground of a defect in the jurat of the affidavit; but this Court allowed the application to be renewed upon amended

(a) 12 Law Journ. (N. S.) Q. B. 40. (b) *Ante*, vol. 1, p. 306, N. S.

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affidavits. The distinction was, that if a rule is discharged upon its merits, the application could not be renewed, but that where the defect was merely formal, the parties might come again to the Court. In *Regina v. Pickles*, the rule was discharged upon its merits; in this case, a point of form only had been relied on.

WIGHTMAN, J.—In *Regina v. The Inhabitants of Barton* (a), it was held, that if a party, through his own neglect, makes an application to the Court on insufficient materials, and his rule is on that ground discharged, he cannot afterwards be allowed to supply the deficiency, and renew his application. That case is in point, and was decided in the full Court. This rule must be discharged, with costs.

Rule discharged, with costs.

(a) *Ante*, vol. 9, p. 1021, O. S.

DAVIS v. PARSONS.

On a motion
for a new trial
in a cause tried

F. V. LEE had obtained a rule, calling upon the defendant to shew cause why the verdict, found by the jury, at the

and a party to the contract, but upon objection by the plaintiff, his evidence was rejected, on the ground of interest, and the jury found for the sum claimed in the declaration. It was urged that Page could have no interest in the event of the suit, and that the defendant was entitled to have laid his evidence before the jury.

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G. T. White now shewed cause. He objected that there was no affidavit verifying an order of Lord *Abinger*, C. B., upon which proceedings in the action had been stayed with a view to this motion. The rule was drawn up on reading the original order, but the order was not verified: nor were its contents set out on the face of any affidavit. [*Coleridge*, J.—The order is before the Court, and surely the Judges take notice of the orders of each other, made for such a purpose as this.] Secondly, the witness proposed to be called by the defendant was an incompetent witness. He was clearly interested in the event of the suit, for if, after his evidence, the plaintiff had recovered, there would have been a sum of money taken from the defendant, so that he would be the less able to pay him, in the event of his subsequently advancing any claim against him. *Poole v. Palmer* (a), and *Russell v. Blake* (b) were distinguishable, and were decided altogether on the effect of the statute, 3 & 4 Wm. 4, c. 42, s. 26.

COLERIDGE, J.—I think the witness was clearly competent; the rule must be absolute.

Rule absolute.

(a) *Ante*, vol. 1, p. 908, N. S.;
 S. C. 9 M. & W. 71.

(b) 2 Scott, N. R. 574; S. C.
 2 M. & Gr. 374.



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GURNEY v. HILL.

Where the declaration in an action of assumpsit on a promissory note, contained no statement of the time when the note became payable, and the defendant demurred thereto on that ground, the demurrer was set aside as frivolous.

CROMPTON shewed cause against a rule for setting aside the demurrer to the declaration in this suit, on the ground that it was frivolous, and for allowing the plaintiff to sign judgment. It was an action on a promissory note, and the declaration stated, that the defendant, on the 8th of November, 1842, made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay the plaintiff 146*l*, yet that he had disregarded his promise, &c. The ground of demurrer was, that the declaration contained no statement how or when the note was payable, nor whether it became payable before the commencement of the suit. The ground on which the present rule had been obtained was, that the count was good, for that if it was not shewn that the note was payable at any particular time, it must be taken to be payable immediately. It was now submitted, however, that the demurrer was valid, and the case of *Hayter v. Moat* (*a*) was cited. If the note was deficient in the particular on which the objection was raised to the declaration, it was the duty of the plaintiff to have declared upon its legal effect.

Gray, in support of the rule. It must be taken that the

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WORTLEY v. GEDGE.

ARNOLD shewed cause against a rule for judgment as in case of a nonsuit. Issue was joined on the 7th of March, 1842, and notice of trial was given for the Spring Assizes for the county of Norfolk of that year. The excuse now offered for not going to trial was, that before the commission day the wife of the defendant had settled the action with the plaintiff, and that on the day before the commission day the plaintiff, who was the step-son of the defendant, gave the defendant verbal notice of such settlement.

Where in answer to a rule for judgment as in case of a nonsuit, it appeared that notice of trial had been given, and that before the day of trial, the wife of the defendant, who was living separate from her husband, settled the action, but that the defendant received no formal notice of the abandonment of the action, although in a private conversation the plaintiff mentioned such settlement to the defendant; the Court discharged the rule only upon a stet processus, or peremptory undertaking being given, and on payment of the costs of the day.

Hance, contrà, in support of the rule, submitted that the defendant was entitled to make the present rule absolute. The settlement of the action had been made behind his back; he had received no formal notice of it on which he could rely, and he therefore was bound to prepare for trial. It appeared that the defendant and his wife were living separate. The defendant had not obtained his costs of the day, and he was entitled to come to the Court with the present motion.

WIGHTMAN, J.—The rule may be discharged upon the plaintiff giving a stet processus, and paying the costs of the day, or else upon a peremptory undertaking and payment of the costs of the day. The defendant was entitled, unless he received formal notice, to suppose that the plaintiff would proceed to trial.

Rule accordingly.

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JONES v. WILLIAMS.

A trial of a cause under the writ of trial act, (3 & 4 Wm. 4, c. 24, s. 17,) before the deputy of the under-sheriff is void.

J. JERVIS had obtained a rule, calling on the plaintiff to shew cause why the verdict found by the jury on the trial of this action should not be set aside, with costs, on the ground of irregularity. It was an action of debt to recover a sum of 7*l.* 10*s.*, and the cause being at issue, a Judge's order was obtained, directing the trial to be had before the sheriff of Anglesea. The ground of the present motion was, that the trial had taken place before one Jones, a clerk to the under-sheriff of Anglesea, who had acted without any deputation from the sheriff.

Townsend shewed cause, and produced an affidavit, in which it was sworn, that Mr. Jones was managing clerk to the under-sheriff, who was an attorney. There was nothing to shew that where an under-sheriff was unable, from any cause, to attend to the trial of suits, he might not appoint a fit person to act in his stead. In *Clark v. Marner* (a), it was held, that where a trial, under the 3 & 4 Wm. 4, c. 42, s. 17, took place before the deputy of a mayor, and it was not shewn that he had no authority to appoint a deputy, the Court would not set aside the proceedings. There was nothing in this case to shew that the under-sheriff

might be taken that the words of the writ of trial act admitted the construction to be put upon them, that the under-sheriff was the Judge; and if so, a deputation from him would be good.

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COLERIDGE, J.—The act authorizes the Court, or a Judge “to order and direct that the issue or issues joined, shall be tried before the sheriff of the county where the action is brought, or any Judge of any Court of record for the recovery of debt in such county.” That can only mean the sheriff or his deputy. The rule must be made absolute, but as no objection was raised by the defendant at the trial, without costs.

Rule absolute, without costs (a).

(a) In the following Trinity Term, a similar rule was obtained by *Alexander*, in a cause of *Murphy v. Robinson*. There *Bliss* shewed cause, and produced an affidavit, stating that the trial had taken place before an assessor, who was a barrister, duly appointed by the sheriff, and that no objection was made at the time of the trial to

his authority.

Alexander contended that the deputation should have been set out upon the face of the affidavits; but

COLERIDGE, J., discharged the rule, with costs.

DOWNES v. GARBUTT.

HOGGINS moved for a rule, calling upon the plaintiff to shew cause why the warrant of attorney, given by the

A warrant of attorney executed by an attorney, is not

within the provisions of the 1 & 2 Vict. c. 110, s. 9, which require the presence of an attorney on behalf of the person giving such an instrument, and is valid, although no attorney shall have attended on behalf of the defendant.

Where it is sought to set aside a warrant of attorney, on the ground that it is a security, collateral only to a security on land, also given to the plaintiff, and that usurious interest is taken, it is the duty of the party seeking to set aside the instrument, to establish clearly that the case falls within the usury laws; therefore, where transactions were stated to have taken place collateral to the execution of the warrant of attorney, on which the allegation of usury was sought to be sustained, and there was nothing to shew that they had not occurred subsequently to such execution, the Court refused to grant a rule for setting aside the warrant of attorney, and judgment and execution thereon; for the criterion by which the nature of the transaction is to be judged, is the security on which the money is originally lent; the *bona fides* between the parties.

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defendant, and judgment and execution thereon, should not be set aside. The first ground on which he moved was, that the instrument was improperly executed, for that it appeared that it had been executed without the presence of an attorney to attest the execution on the part of the defendant. From the affidavits, it appeared, that the execution of the instrument was attested by the attorney of the plaintiff; but it was also stated, that the defendant was himself an attorney. In *Chipp v. Harris (a)*, the Court of Exchequer held that the act of Parliament, 1 & 2 Vict. c. 110, s. 9, requiring the presence of an attorney on behalf of a defendant, executing a warrant of attorney, did not apply to cases where the defendant was himself an attorney; but in *Lush's Practice*, p. 715, it was said, commenting on that case, "it is submitted that the same reason which exempts an attorney would exempt a barrister—would exempt an attorney's clerk, and various other persons from whose profession or calling, it might reasonably be inferred that they are cognizant of its nature and effect; and that so to hold would be directly to contravene the section just noticed." It was contended, that this observation was founded on reason. Besides the main point decided in the case cited was, that such an objection as was relied upon, could not be taken by a third party, and the question of the sufficiency of the execution of the instrument, there-

COLERIDGE, J., (on the 9th of May) delivered the following judgment.—This was a motion for a rule nisi, to set aside a warrant of attorney and all subsequent proceedings, on the grounds; first, that the execution of the instrument was not duly attested by an attorney attending on behalf of the defendant; secondly, that the instrument is void for usury; and thirdly, that the writ of ca. sa. issued upon the judgment signed upon the warrant of attorney is irregular. On the last point, I think that there is some uncertainty and a rule may go, but upon the first ground raised, I think the application must be refused. From the affidavit on which the motion is made, it appears that the defendant had himself prepared a warrant of attorney, and had wished that it should be referred to an attorney named by himself, but that the plaintiff did not like the name suggested, and insisted on his own attorney being called in, and finally the warrant of attorney was drawn by Mr. Jones, his own attorney, in whose presence it was executed. The question which arises upon this part of the case is nothing more than this, whether the attestation of Mr. Jones is sufficient? According to many cases which have been decided, such an attestation would not ordinarily satisfy the statute; but then it appears that the defendant is himself an attorney, and the point is, whether the statute applies to the case of an attorney defendant as strongly as to the cases of other persons? In *Chipp v. Harris*, the point was decided as far as the expression of an opinion by Lord Abinger, C. B., concurred in by the whole Court goes, that the case of an attorney is not within the act. There, however, another objection was raised, namely, whether the application being made by a third person, could be successful, so that it does not necessarily follow that the case was decided upon the point which is now mooted. But there is at all events a clear expression of opinion by the Court, that the case of an attorney does not fall within the provisions of the statute of 1 & 2 Vict. c. 110, s. 9. It is no new rule of construction that if a case, or a class of persons is not

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within the mischief of an act, its provisions do not apply; and when one sees that attornies are peculiarly pointed out to inform persons about to execute such instruments of their nature and effect, it is too much to say that in cases where they are themselves about to execute instruments of this sort, there should on all occasions be attornies present on their behalf. Mr. *Hoggins* cited a very able book of practice, I mean that of Mr. *Lush*, who, at p. 715, notices the case of *Chipp v. Harris*, and suggests reasons why the statute should not bear the construction which was there put upon it. I do not mean to say that there is nothing in the observation of the learned author, and indeed such a remark can very seldom be made in reference to what he says in this book, but I think that in this case there is a clear line drawn between attornies and other persons, and that the same rule will not hold with regard to them which obtains in other cases, from the very circumstance that they are selected to impart information to others upon this very subject. At all events, there is the express opinion of the Court of Exchequer in favour of this view, to which I must give my assent, stating at the same time my full acquiescence in it. The second point which was raised is that the instrument is vitiated on account of usury—it is said that a larger amount of interest is taken than is lawful, and that the case is thereby taken out of the 2 & 3 Vict. c. 37,

urity of land. That case seems to furnish a ground of construction, and it is reasonable, on the authority of that case, to suppose that if the original security was on land it would be taken out of the statute. Here some doubt exists on this point, but it is incumbent on the party applying to shew that the case falls within the meaning of the act. That is not made out here, for it is consistent that all the transactions detailed in the affidavits were subsequent and collateral to the original transaction, and on these points, therefore, no rule should go.

Rule refused.

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AITCHESON v. MARSH.

WORDSWORTH shewed cause against a rule for judgment as in case of a nonsuit. Issue was joined on the 20th of July, 1842; and notice of trial given on the same day for the next Assizes at Liverpool; the plaintiff did not proceed to trial, but on the 25th of July, gave notice of countermand. An affidavit was produced in which it was sworn that the defendant was insolvent, and that "the plaintiff was not aware of his insolvency at the time of issue being joined." A stet processus was offered, and it was urged that no vexatious proceedings having been taken against the defendant after issue joined, the Court would not make the rule absolute, but would discharge it on the terms proposed. *Topping v. Brown (a)*, was cited, where it was held, that in order to render the insolvency of a defendant a valid ground for not proceeding to trial, it must be shewn that the knowledge of that fact did not come to the plaintiff before the last step taken by him in the cause. It was urged that that proposition was here clearly made out.

Where issue was joined on the 20th of July, and on the same day notice of trial was given for the ensuing Assizes; but on the 25th, the plaintiff countermanded such notice; upon a motion for judgment as in case of a nonsuit, the plaintiff swore that the defendant was insolvent, and that he was not aware of his insolvency at the time of issue being joined; and it was held, that the defendant was entitled to a peremptory undertaking, or to make his rule absolute, the plaintiff

(a) *Ante*, vol. 9, p. 582, O. S.

having allowed proceedings in the cause to go on, after he had become acquainted with the fact of the defendant's insolvency.

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Humfrey, in support of the rule. The defendant was entitled to a peremptory undertaking; the plaintiff, at all events, according to his own admission, had allowed five days to elapse after he was aware of the defendant's insolvency, namely, from the 20th to the 25th of July, before he stayed proceedings; and although he had taken no steps during that time, he had caused the defendant to go to great expense in preparing for the trial.

COLERIDGE, J.—The rule must be made absolute, unless the plaintiff gives a peremptory undertaking. There is one rule which is clear and certain; that is, that after a plaintiff obtains knowledge of the defendant's insolvency, he must not go on. Here five days elapsed after he obtained that knowledge before he stayed his proceedings.

Rule accordingly.

READ v. FORDE.

Upon application for leave to enter an appearance for the defendant, after the issuing

MILLER moved for leave to enter an appearance for the defendant, after the issuing of a writ of distringas. It appeared that the sheriff had returned nulla bona and non

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Ex parte CARNLEY.

HOGGINS moved for a rule to discharge the applicant from his articles of clerkship; and also calling on one Cooke to shew cause why it should not be referred to the Master to determine what portion of the premium paid by the applicant to Mr. W., an attorney of this Court, on his articles of clerkship, should be refunded, and why he should not pay such amount as the Master should report to be reasonable. It appeared that the applicant had been articulated to Mr. W., and had paid a premium of 40*l.*; Mr. W., however, had recently absconded, making an assignment of all his goods and effects to Mr. Cooke. *Ex parte Bayley (a)* was referred to.

Where an attorney had absconded, and had assigned all his property to an individual, the Court refused, on the application of an articulated clerk, to call upon the latter to refund any portion of the premium paid on his articles, but granted a rule for discharging the clerk from his articles.

WIGHTMAN, J.—I cannot grant that part of your motion which refers to Mr. Cooke; you may take a rule on the other part of the case.

Rule accordingly.

(a) 9 B. & C. 691; S. C. 4 M. & Ry. 603.

REGINA v. The EASTERN COUNTIES RAILWAY COMPANY.

JAMES moved for a rule, calling on the Eastern Counties Railway Company to shew cause why a mandamus should not issue, commanding them to issue their precept to the sheriff of Essex, to summon and empanel a jury to inquire into and assess to one Finch, his damages, occasioned by the construction of certain works of the said railway. It appeared, from the affidavits on which the motion was founded, that Finch was the tenant from year to year, and

Where there had been an inquisition of damages before the sheriff, under the provisions of a Railway Act, such inquisition being duly taken in pursuance of a precept issued by the railway company, the

Court refused to grant a mandamus, commanding a new precept to be issued upon the grounds of misdirection by the presiding Judge at the inquisition, of the improper rejection of evidence; and that the verdict was against the evidence, and the damages awarded were grossly insufficient.

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occupier of certain premises, situated in the neighbourhood of Chelmsford: that the fee-simple of a portion of those lands was purchased by the Eastern Counties Railway Company, for the purpose of constructing the Railway thereon, and that the company also temporarily used a portion of the remainder of the land, by passing to and fro, across the same with carts, horses, and workmen, as they were empowered to do under the provisions of the acts, (6 & 7 Wm. 4, c. cvi. and 1 & 2 Vict. c. xxxi.) by which the construction of the railway was authorized. Mr. Finch having claimed compensation for the damage done to his premises by the railway company, a precept was issued by them to the sheriff of Essex, to summon and empanel a jury, "to assess satisfaction, recompense or compensation, for damage before that time done and sustained by him, in and about the lands now or formerly in his occupation, &c., by reason of the execution of any of the works by the said acts authorized, at, upon, or near to the said lands, or for the future, temporary or perpetual, or for any recurring damage to be done to, or sustained by him as aforesaid." At the trial of the inquisition, Mr. Finch proposed to give evidence of damage done to the growing crops on his land, by the construction of the railway; and also of damage done by the temporary user of a portion of his land by the company. In support of the latter part of his case, he offered evidence to shew that a temporary road had been made over his meadow, destroying the pasturage, but that the meadow had, in other respects, always remained under his control. The under-sheriff, however, rejected this evidence, upon the ground that, by the 50th section of the former act, authority was given to justices, upon complaint made to them, to award damages in respect of the temporary occupation of any land. For Mr. Finch it was urged, that this provision was not applicable, for that there had not, in this case, been a temporary occupation, but a mere user of the land; but the presiding Judge withdrew this branch of the case from the consideration of the jury. In this respect, it was

submitted, there had been a misdirection. A further objection was raised, that the verdict was against the evidence. Mr. Finch had originally claimed 542*l.*; by his witnesses he proved damage to the amount of 411*l.*; the company, by the witnesses called for them, shewed that the damage was 152*l.* 10*s.*; but the jury, nevertheless, awarded only 49*l.* It was admitted, that this was an application in the nature of a motion for a new trial, and that doubts existed, whether, in such a case, a new trial could be had, as by the act the verdict was made final. If the Court saw that obvious injustice had been done, however, it would not hesitate to put a party in a position to maintain his rights. It would be unavailing to move to bring up the inquisition, for, in all probability, it would exhibit no defect on the face of it. The case of *Regina v. The Sheffield and Manchester Railway Company (a)* was referred to.

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Cur. adv. vult.

COLERIDGE, J.—This was an application made by Mr. *James*, for a rule, calling upon the Eastern Counties Railway Company to shew cause why a writ of mandamus should not issue, commanding them to issue a precept to the sheriff to summon a jury, to assess damages for injury, alleged to have been sustained by a person named Finch, by reason of the works of the company's railway. It appeared, that in point of fact, such a precept had already issued, and that a jury had sat under it, to assess damages in respect of all the causes of damage, for which compensation is now sought to be obtained, and that they returned a verdict for the sum of 49*l.* It is said, that this is a sum grossly under the amount which Mr. Finch is entitled to claim; that he proved damage to the amount of nearly 500*l.*, and the insufficiency of the verdict is attributed to two causes; one, that the sheriff excluded one entire set of

(a) 11 Ad & Ell. 194; S. C. 3 P. & D. 111.

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damages from the consideration of the jury, on the ground that they were properly recoverable under a particular section of the company's act before a justice; another, that although the claimant proved a much larger amount of damage than that found, the jury, from some personal cause, chose to give a verdict for an inadequate amount. It was admitted that a direct motion for a new trial could not be made, and no doubt that was a proper admission; for the proceeding is the creature of the act of Parliament, and the section of the act, by which it is directed that such a proceeding shall be had, makes the verdict final: but if this be not so, I am at a loss to see what machinery this Court has to direct a new trial. But it was said, that the Court might direct a second precept to issue. It appears to me, however, that if I acceded to such a proposition, I should only be doing a thing indirectly, which cannot be done directly. If a mandamus should go, the return would be that a precept had already issued, and the only answer to such a return would be "Yes! but justice has not been done under that precept;" so that in point of fact, it would still come to the same thing, that the Court would be called upon to grant a new trial. I am informed that a like application has been made in the full Court in another case, and that it was refused. I do not know whether injustice has been done or not; but even if it has, I have

16*l.* 14*s.* 8*d.* for demurrage, and the writ of summons was indorsed to recover that amount. The declaration contained two special counts. The first count alleged, that on the 8th of September, 1841, in consideration that the plaintiff, at the request of the defendants, would sell to the defendants a large quantity, to wit, two hundred and twenty-six tons and fifteen hundred-weight of coals, parcel of a cargo of coals then on board of a certain ship or vessel, called the *Osprey*, then in the port of London, at and for a certain price, to wit, the price of 223*l.* 18*s.* 2*d.*, and would work the same out of the said ship, and would deliver the same at the said port, alongside the said ship, to the defendants, at the rate of forty-nine tons thereof, for and during each and every working day, in manner and at the times following, &c.; the defendants then promised the plaintiff to purchase of him the said two hundred and twenty-six tons and fifteen hundred-weight of the said cargo of coals, at and for the price and upon the terms aforesaid, &c.; averment, that the plaintiff, confiding in the said promise of the defendants, did afterwards, to wit, on, &c., sell to the defendants the said first mentioned quantity of coals, and that defendants purchased the same, &c., and although the turn for the said ship to have her cargo worked out and discharged at the said port did afterwards arrive, &c., and although the plaintiff was at all times ready and willing to work the said coals so purchased by the defendants, as aforesaid, out of the said ship, and deliver the same, &c.; yet the defendants, not regarding their said promise, did not, nor would take and receive the said coals so bought by them, &c., but wholly refused and omitted, and neglected so to do, &c., and thereby the said coals so purchased, &c., remained and continued in the said ship for a long time, to wit, for the space of one day longer than the same otherwise would have done, and during that time the plaintiff lost, and was deprived of, the use of the said ship, and the plaintiff incurred and was put to divers expenses and costs, amounting, to wit, to 5*l.*, in and

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about the wages, and keeping and maintaining the master and crew of the said ship, during that time, and also divers costs and charges, amounting, to wit, to 5*l.*, in and about the retaining and employing the crew, for the purpose of, and in and about the preparing and making ready for the working and discharging the said coals so purchased by the defendants, as aforesaid, out of the said ship, during the time when the defendants so omitted and neglected to take and receive the said coals as aforesaid, and the plaintiff hath been, and is, by means of the premises, otherwise much damnified.

Second count: that on the 15th of November, 1841, in consideration that the plaintiff, at the request of the defendants, would sell to the defendants a large quantity, to wit, a cargo of coals then on board a certain ship or vessel, called the Atlantic, then in the port of London, at and for a certain price, to wit, 27*l.* 6*s.* 6*d.*, and would work the same out of the said ship, and deliver the same at the said port, alongside the said ship, to the defendants, &c., when the turn for the said ship to have her cargo worked out and discharged at the said port should have arrived, the defendants then promised the plaintiff to purchase the said cargo, &c.; averment of sale by plaintiff to defendants, and that although the turn for the said ship to have her cargo worked out did arrive, and although the

penses and costs, to wit, 5*l.*, in and about the wages and keeping of the master and crew of the said ship, and also divers costs and charges, to wit, 5*l.*, in and about the retaining and employing of men for the purpose of, and in and about preparing and making ready for the working out and discharging the said cargo, &c.

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There were also the common counts for demurrage, for money paid, and on an account stated, and damage alleged to the amount of 20*l.*

The particulars of demand claimed 16*l.* 14*s.* 8*d.* The defendants suffered judgment by default, and notice of executing a writ of inquiry of damages was given for the 20th of September, 1842; on the 16th of September, an order of *Williams, J.*, was obtained at Chambers, to stay all further proceedings in the action, on payment of the sum of 16*l.* 14*s.* 8*d.*, and costs. On the 7th of November the costs were taxed on the higher scale at 59*l.* 17*s.*

Petersdorff, on the 9th of November, moved for a rule, calling upon the plaintiff to shew cause why this taxation should not be reviewed, upon the ground that the costs should have been taxed upon the lower scale, under the rule of Court of H. T., 4 Wm. 4.

Atherton now shewed cause. The costs had been rightly taxed upon the higher scale. It was a rule which had been always acted upon, that where the action was of such a nature, that if it went to trial, it would be tried before a Judge of a superior Court, costs upon the higher scale should be allowed. It was also the practice that actions for unliquidated damages should not be tried before the sheriff; and although the declaration contained indebitatus counts, yet if there were also counts for unliquidated damages, the case was taken out of the Writ of Trial Act, 3 & 4 Wm. 4, c. 42, s. 17. *Jacquet v. Bower* (a), *Lawrence*

(a) 5 M. & W. 155; S. C. *Ante*, vol. 7, p. 331, O. S.

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v. *Wilcock* (a). Within the authority of those cases, this action could not have been tried before the under-sheriff, because the first and second counts in the declaration were for unliquidated damages. The measure of damages to which the plaintiff was entitled could not be ascertained until it was proved by witnesses what was the value of the ship; how many men were employed, and to what amount of wages they were entitled; and it was in respect of these several matters that the action was brought: and even though the writ of summons was indorsed for less than 20*l*, or less than 20*l*. was recovered upon the proofs given, the test of the damages claimed being unliquidated, must still be applied. *Lismore v. Beadle* (b). If the action was not triable before the sheriff, the fact of the defendants avoiding a trial could make no difference, because the principle applicable to the case must remain the same. He referred to *Hooppell v. Leigh* (c). The Master, in coming to a decision upon this matter, had felt himself bound by the case of *Croft v. Miller* (d). There, in an action of covenant for unliquidated damages, the defendant allowed judgment to go by default, and upon inquiry before the sheriff, the damages were assessed at less than 20*l*: it was held that the costs must, nevertheless, be taxed upon the higher scale. That case was in point, except that here proceedings had been stayed upon a Judge's order, directing pay-

"directions to taxing officers" were co-extensive with the 3 & 4 Wm. 4, c. 42, s. 17. They were not so, but they were express in their provision, that "in all actions of assumpsit, debt, or covenant, where the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* (without costs); the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed" (*a*). Here less than 20*l.* had been agreed to be paid on the settlement of the action, and no general question of the damages being unliquidated, or of the cause being triable before the under-sheriff, arose. In *Cook v. Hunt* (*b*), which was an action for unliquidated damages, an order was made for a stay of proceedings, upon payment of 11*l.* 5*s.*, and costs to be taxed by the Master, after an application to have the cause tried before the sheriff had been successfully opposed, and the Court of Exchequer held that the costs must be taxed upon the lower scale; and the Court, in giving judgment, said, that where a party, when such an order was made, sought to obtain costs on the higher scale, he must make it a part of his order that the costs should be so taxed. *Dixon v. Walker* (*c*), and *Wallen v. Smith* (*d*), were also in favour of the defendants.

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Cur. adv. vult.

WIGHTMAN, J., (on the 3rd of May) gave judgment. He said, the proper course to be pursued, where the plaintiff is content to take a sum of money less than 20*l.* in satisfaction of his debt, in cases not triable before the sheriff under the Writ of Trial Act, is that suggested by the Court of Exchequer in the case of *Cook v. Hunt*, and that the plaintiff should insist, in such a case, that it should be

(*a*) *Ante*, vol. 2, p. 485, O. S. S. C. 7 M. & W. 214.

(*b*) *Ante*, vol. 7, p. 397, O. S.; (*d*) *Ante*, vol. 6, p. 103, O. S.;
S. C. 5 M. & W. 161. S. C. 3 M. & W. 138.

(*c*) *Ante*, vol. 8, p. 887, O. S.;

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made part of the order, that the costs should be taxed on the higher scale. Here there was no such term imposed, and the rule must be absolute for reducing the bill of costs to the amount recoverable upon the lower scale of taxation.

Rule absolute.

GUTTERIDGE v. SETH.

Where an action of debt was tried before the sheriff and the jury returned a verdict for 20*l.* debt, and 1*s.* damages, it was held, that the jurisdiction of the sheriff, under the Writ of Trial Act, was not thereby vitiated or taken away.

G. T. WHITE moved for a rule, calling upon the plaintiff to shew cause why there should not be a new trial of this action. It was an action of debt, and the trial had been had before the assessor of the sheriff of Middlesex: the jury had found a verdict for the plaintiff, debt, 20*l.* damages, 1*s.* It was contended, that this was a case which did not fall within the provisions of the 3 & 4 Wm. 4, c. 42, s. 17, which authorizes the trial of causes before the sheriff, for that the amount of the verdict deprived the sheriff of his jurisdiction; and that there had, therefore, been a mis-trial. The case of *Edge v. Shaw* (a) was cited.

WILLIAMS, J.—The act refers to the sum indorsed on the writ of summons. In this case, it was 20*l.*, and the jury having found 1*s.* damages, no more vitiates and takes away

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SPICER v. BOND.

BARSTOW moved, on behalf of the defendant, for a rule to make a Judge's order a rule of Court, and also requiring the plaintiff to pay the costs incidental to the motion. He contended that he was entitled to a rule absolute in the first instance; for the plaintiff had been already served with the Judge's order, and compliance with its terms demanded, but he had refused to obey them. The object now was to obtain a rule of Court to give the order the effect of a judgment, under the 1 & 2 Vict. c. 110, s. 18. The Judge's order directed the payment of certain costs.

The Court will not grant a rule absolute in the first instance for making a Judge's order a rule of Court, where by the rule, costs are sought to be imposed on the opposite party.

WIGHTMAN, J.—The rule to make a Judge's order a rule of Court, would be absolute in the first instance; but you seek also to obtain the costs of the motion. The plaintiff may have some cause to shew against that, and I think you can only take a rule nisi.

Rule nisi accordingly.

REGINA v. The Churchwardens and Overseers of the
PARISH of St. PANCRAS.

J. HENDERSON shewed cause against a rule, calling upon the prosecutors of this mandamus to pay the costs of the writ. It appeared, that it was a mandamus requiring the churchwardens, overseers, and inhabitants of St. Pan-

The statute, 1 Wm. 4, c. 21, s. 6, which gives costs on writs of mandamus, whether the writ shall be grant-

ed or refused, and also if the same shall be issued and obeyed, applies not only to the mere costs of the application and of the writ, but to the costs of the return and the subsequent proceedings.

Where cause was shewn against a rule nisi for a writ of mandamus against the churchwardens, overseers, and inhabitants of a parish, and no objection was made upon the ground, that under a local act of Parliament, (a public act,) the directors of the poor were responsible for the matter sought to be enforced; but the writ being granted, upon the return thereto, such an objection was successfully raised, the Court, in its discretion, refused to compel the prosecutor of the mandamus to pay any costs incurred antecedently to the return.

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cras, to pay to the Skinners' Company a certain charge or annuity of 18*l.* per annum. The prosecutors the trustees of a charitable estate, situated in the parish of St. Pancras, a portion of which was taken for the purpose of forming a line of street, called the New Road. The mandamus was obtained upon the assumption, that the charge in question, which was in the nature of a charge in respect of a highway, was borne by the parish at large. The writ was accordingly addressed to the churchwardens, overseers and inhabitants of the parish. A return had been made to the writ, it came on to be argued in the month of November, 1841; and it then appeared, that by a local act which was admitted to be a public act, (59 Geo. 3, c. 12) the writ should have been issued to the directors of the poor, instead of the churchwardens, overseers, and inhabitants. The present rule had been obtained in the latter part of this Term. An affidavit was now produced, in which it was sworn, that in point of fact, the parties were entirely ignorant of the existence of the act in question. It was argued that the parish of St. Pancras had disentitled themselves to the costs, for they had suffered the writ to issue without any reference to the existence of this statute, although its production would have been as good an answer to the rule nisi for the writ, as to the writ itself. Upon this ground, if the Court should hold the prosecutor liable to any costs, it would be to such only as had been incurred in showing cause against the rule nisi. Reasonable ground existed at all events for the prosecutors to proceed with the mandamus. There could be no doubt that they were really entitled to the money which they sought to obtain, and they were bound to take proceedings with a view to its recovery. But the statute 1 Wm. 4, c. 21, s. 6, did not authorize this application, except in reference to the costs of the writ itself; and the present applicant could not obtain any costs of his return to the writ, for that section provided only for cases where the writ was "granted or refused," and where the writ was "issued and obeyed," and

was silent as to cases where a return was made, and the writ therefore, was not obeyed. At all events this was not a case in which the Court would exercise its discretion in favour of a party, who had acted so unfairly as the persons who now made this application.

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Barstow, in support of the rule. The provisions of the statute obviously referred to the general costs of a writ of mandamus, and in *The Queen v. The Mayor, &c. of Newbury* (a), the Court decided, that after argument and judgment on return to a mandamus, costs would be given to the successful party, unless very strong ground of exemption be shewn on the other side. [*Wightman*, J.—That case is decisive upon the objection raised upon the act of Parliament by Mr. *Henderson*. The circumstances of the objection not being taken there, and that the Court has at all times considered the determination of the Legislature to be general, warrant me in coming to the conclusion that the statute applies to this case, and that the right to costs is not limited, as is contended]. Secondly, on the merits, the statute which governs the affairs of the parish of St. Pancras, is a public act, and one, therefore, which the prosecutors of this mandamus were bound to know. [*Wightman*, J.—The question is, whether, in the exercise of my discretion, I shall not take it into consideration that you deceived the prosecutor by allowing the writ to go, although you were aware that it could not succeed upon the very ground which you make the subject-matter of a return?] There was no case in which the Court had drawn such a distinction as was proposed; the parish of St. Pancras had been entirely successful upon the return, and should have the whole of their costs.

WIGHTMAN, J.—The question now is, how I shall exercise the discretion given to me by this act of Parliament? The

(a) 1 Q. B. 751; S. C. 1 G. & Dav. 388.

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parish of St. Pancras misled shewing cause against the told them that they were g there is no doubt proceedi been immediately stayed. jection, and the prosecutor got the right men. I think be absolute, for the costs o quently incurred, but it m costs which were incurred b cannot have the costs of thi

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On the 4th of January, the plaintiff gave notice of trial for the first Sittings in Term, which commenced on the 12th of January; the plaintiff not having entered his record, on the 11th of January the defendant entered a ne recipiatur under the Reg. Gen., H. T., 12 & 13 Car. 2, r. 2; on the 14th of January, the plaintiff gave a notice of trial by continuance for the 1 and at such second sittings the cause was tried in the obtained a verdict: *Semble*, that the entry of the ne r circumstances was not a hindrance of the plaintiff in th M. T., 4 Anne; for that until the record was carried for trial: *Held*, that such second notice of trial, by c notice, within the meaning of the same rule, and th must be set aside; for that after the entry of a ne r notice of trial to a new and not an adjourned sittings by continuance.

PICKERING moved for tiffs to shew cause why th verdict found by the jury, s ground of irregularity. It at issue, notice of trial was the first sittings in Hilary up to and on the 10th of entered the record, and on fendant entered a ne recipi gave notice of trial, by con on the 17th of January; the at Chambers on the 15th, summons was heard on th

refused to interfere, and the cause was tried on the 17th, as an undefended cause, and a verdict taken by the plaintiffs. It was submitted, that according to the practice of the Court, this trial was irregularly had. The plaintiffs were bound to enter the cause two days before the commencement of the sittings; as they had not done so here, the defendant was entitled to enter a ne recipiatur, and the effect of his doing so was to render the notice of trial totally invalid. That being so, the notice of trial by continuance was bad.

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Peacock, on a subsequent day, shewed cause. The notice of trial as originally given on the 4th of January, was a good notice for the 12th. The plaintiffs were hindered from proceeding to trial upon that notice by the entry of the ne recipiatur by the defendant. In *Chitt. Arch.* p. 209, and *Tidd's Pract.* p. 757, ed. 9, it was laid down, that if the defendant enter a ne recipiatur, so as to hinder the plaintiff from trying his cause at a certain sitting in Term, the plaintiff may, during such sittings, give the defendant notice of trial for the next sittings, and proceed to the trial of his cause accordingly. For that proposition the case of *Highmore v. Walker* (a) was cited, which was as follows:—“In a cause to be tried at the sittings, the defendant entered a ne recipiatur, and the question was, whether the plaintiff could go on at the next sittings without a new notice? It was agreed, that if no ne recipiatur had been entered, there must have been two days' notice. The clerks upon the principal question thought no notice necessary; their reason was, because the defendant himself had hindered the plaintiff's proceedings, and therefore ought at peril to attend the next sittings. But *Holt*, C. J., contrà. The notice fell to the ground with the trial. A rule was made, that where a ne recipiatur was entered, the plaintiff shall give notice the same sittings, and before they are over, that

(a) 2 Salk. 653.

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he will proceed to trial the next sittings; and it was said, that if a cause be not entered two days before the sittings, the defendant may enter a ne recipiatur." The effect of the rule as there cited, and of the case, was this; that where a defendant hindered the plaintiff from proceeding to trial, by entering a ne recipiatur, the plaintiff might, by a notice given before the termination of the sittings for which notice of trial had been originally given, proceed to trial at the next sittings; and such second notice must necessarily be taken to be a notice by continuance, for the sittings did not last eight days, and there was not time, therefore, to give a complete notice. That was the course which had been here adopted, for the first sittings began on the 12th, and terminated on the 16th of January; and notice of trial by continuance was given on the 14th, for the second sittings on the 17th.

Thesiger and *Pickering*, in support of the rule. The plaintiffs had not been hindered from going to trial by any act of the defendant, for they would have been unable to go to trial, even if the ne recipiatur had not been entered. They were bound by the Reg. Gen., 15 & 16 Car. 2, reg. 2, to enter the record two days before the sittings; but they had already suffered the time to go by, when the ne recipiatur was entered, at which they could have carried in the

WILLIAMS, J., on the 22nd of April gave judgment.— This case was discussed before me in the course of last Term, and has stood over since then for judgment. The question which I have to determine, I believe, has never been raised before; I can find no direct authority upon the subject, and the books of practice are, in the main, silent upon it. The facts, as they are disclosed upon the affidavits, are these:—Notice of trial was given for the 12th of January, the first sittings in Hilary Term, in the ordinary manner; but the cause was not entered, and on the 11th of January, a ne recipiatur was entered by the defendant with the Marshal. On the 14th of January, fresh notice of trial for the second sittings, which were held on the 17th, was given by the plaintiffs, and the question is, whether a trial had, in pursuance of such notice, is a good and valid trial. There are two rules of Court bearing upon the point, the first of these applies to the necessity for entering the cause a certain time before the sittings; the second relates to the effect of a ne recipiatur. The rule of Hilary Term, 15 & 16 Car. 2, reg. 2 (K. B. 1663), is as follows:—"It is further ordered, that unless the cause to be tried at London and Middlesex be entered with the Chief Justice of this Court by the space of two days before the sittings upon which such causes are to be tried, the Marshal may enter a ne recipiatur at the request of the defendant or his attorney." According to this rule, the plaintiffs having failed to enter the cause "by the space of two days before the sittings," for which they had given notice, the defendant was entitled to enter a ne recipiatur. But there is then the rule of Michaelmas Term, 4 Anne, (1705), which is to this effect: "It is ordered, that if the defendant in any action in London or Middlesex, to be tried at the sittings of the Lord Chief Justice of the Court, shall enter a ne recipiatur, and by reason thereof hinder the plaintiff that he cannot proceed at that sitting, then it shall be lawful for the said plaintiff to proceed to trial in the said cause at the next sitting of the said Chief Justice after the entering of the

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said ne recipiatur, upon notice given during the said first sittings." It is upon this second rule, that the present case has been principally discussed, and that the doubt has been raised. It was argued by Mr. *Thesiger* that this rule did not apply here, and he contended, with much truth, that in this case, it could not be said that the plaintiffs had been hindered from going to trial by the entry of the ne recipiatur by the defendant, for that the plaintiffs by their own neglect, in omitting to enter the cause, had deprived themselves of the possibility of going to trial. But that does not seem to help me out of the difficulty, and I think that in order to decide the case, I must look at the effect of the notice which was given, bearing in mind the provisions of the rule of 4 Anne; and in this view of the case, I think it will be material to consider what was the state of things at the time that rule was promulgated. At that time, it is clear there were no such things as adjourned sittings; there was one entire sitting, and one only; and at that time, therefore, the present form of notice to a second sitting would have been altogether inapplicable. No such things existed in practice until an additional Judge was appointed, and the sittings of this Court commenced. Therefore, at the time when the rule of Court was made, this would have been a bad notice, and this ought to form no small ingredient in the opinion which I am forced to

been made upon this subject by Master Bunce, who has been at very great pains to ascertain the proper practice to be adopted, and he has conferred with the rest of the Masters upon the subject, and they all concur in the view which I have taken, and have now expressed. The rule of practice is, after all, founded upon that which has been usually done, and on such points, therefore, the opinion of the Masters is extremely valuable. The result of my opinion in this case is, that the trial was improperly had, that the verdict is, therefore, irregular, and must be set aside.

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Rule absolute.

BROWNE v. GISBORNE.

CHARNOCK, moved for a rule for a writ of habeas corpus ad testificandum to bring up the body of a prisoner to give evidence in this suit. [*Coleridge, J.*—This need not be moved in Court, but an application should be made at Chambers]. The statute 44 Geo. 3, c. 102, which gave the writ of habeas corpus ad testificandum provided, that it should “be lawful for any Judge of his Majesty’s Court of King’s Bench or Common Pleas,” &c. to grant the writ.

The application for a habeas corpus ad testificandum should be made to a Judge at Chambers, and not in Court.

COLERIDGE, J.—That is, sitting at Chambers. In practice, it is always now done at Chambers.

Rule refused (a).

(a) Vide Chit. Arch. 233, 4; *Rex Sherry*, 2 Moore, 33; S. C. 8 v. *Pilgrim*, ante, vol. 4, p. 89, O. S.; Taunt. 148. S. C. 3 Ad. & Ell. 485; *Leigh v.*

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REGINA v. The Inhabitants of St. MARY, WHITECHAPEL.

On the 20th of April, the Court of Quarter Sessions granted a case for the opinion of the Court of Queen's Bench; on the 13th of October, notice in writing of an intended application for a writ of certiorari to bring up the order of Sessions, was served upon two justices; on the 20th of October, an application was made at Chambers, for a Judge's fiat, allowing the issuing of a certiorari; no

Judge being in town on that day, an affidavit of notice to the justices, and of the other necessary facts, was sworn before a commissioner, and on the same day, the affidavit was filed at the Crown Office, and a writ of certiorari issued; on the 21st of October, the Judge's fiat was obtained and filed at the Crown Office. Upon motion to quash the writ of certiorari, quia improvidé emanavit,

Held, first, that the notice to the justices on the 13th of October, under the 13 Geo. 2, c. 18, which requires six days' notice of an intended application for a certiorari, was in abundant time,

THIS was a rule calling upon the inhabitants of St. Mary, Whitechapel, to shew cause why a writ of certiorari should not be set aside, quia improvidé emanavit, upon the grounds, first, that there had been no sufficient affidavit filed in support of the writ; secondly, that there had been no Judge's fiat obtained to warrant the issuing of the writ; and, thirdly, that the application for the writ was too late. From the affidavits, it appeared, than an appeal was lodged at the Middlesex Sessions against the removal of a pauper from the parish of St. Mary, Whitechapel, to that of All Saints, Maldon, in the county of Essex. At the Easter Sessions, on the 20th of April, 1842, the appeal came on to be heard, when upon certain objections raised by the appellants to the sufficiency of the examination of the pauper, the Court directed the order to be quashed, but granted a special case for the opinion of the Court of Queen's Bench. On the 13th of October, notice was given

of the intention of the respondents to apply for a writ of certiorari, and, on the 20th of October, an application was made at the Chambers of Lord *Denman*, C. J., for his fiat for the issuing of the writ. It appeared that the learned Judge was not then in attendance, and there being no Judge in town, an affidavit of the notice to the justices on the 13th of October, and of the other necessary facts, was sworn before a commissioner. On the same day, the writ of certiorari was issued founded upon this affidavit, but without the fiat of any Judge. On the 21st, the fiat of *Cresswell*, J., was obtained, and was then filed at the Crown Office. It was now objected that the affidavit in support of the application for the fiat, was insufficient. The affidavit stated that the deponent "did, on the 13th of October, serve John Wilkes, Esquire, one of the justices of the county of Middlesex, with a notice, in writing, of the intended application, by leaving the same at his house; and did also serve Henry Witham, Esquire, by leaving a true copy thereof at the chambers of the said Henry Witham, situate No. 6, Old Square, Lincoln's Inn, in the county of Middlesex." It was contended, that it was consistent with this affidavit, that the notice had never reached the hands of Mr. Witham, or, at all events, that he had not received it until after the 13th of October, and that in either point of view, the service would be insufficient, for that the statute of 13 Geo. 2, c. 18, s. 5, required that six days' notice of the application should be given to the justices. Secondly, by the same statute it was enacted, that no writ of certiorari shall be granted to remove any order of justices at sessions, "unless such certiorari be moved or applied for within six calendar months next after such order, &c." In order to obtain the certiorari the fiat of the Judge was necessary, but here the certiorari was issued on the 20th of October, and the fiat, professing to authorize the issuing of such writ, was not signed until the 21st. The fiat, however, was a condition precedent to the issuing of the certiorari. Thirdly, the application for the certiorari

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to the Judge at Chambers was too late. By the statute, it was required to be moved or applied for within six calendar months. The six months must be reckoned exclusively of the last day, which would be the 20th of October, and the application on that day was, therefore, too late. *Castle v. Burditt (a)*, *Ex parte Fallon and Wife (b)*, *Williams v. Burgess (c)*, were cited. The application at Chambers besides was not sufficient, for the statute must be taken to mean a valid and effectual application, but it was not until the 21st of October that this application availed.

Bodkin, in this Term, shewed cause. First, as to the service of notice on the justices, he proposed to read an affidavit, stating that the notice had been put into the letter-box at Mr. Witham's chambers on the 13th of October, and that Mr. Witham had been seen by the deponent, and had stated, that he had "duly received the notice with his other letters of that day."

Dowling, Serjt., in support of the rule, objected to this affidavit being read, and contended that inasmuch as the certiorari could be only issued upon due proof upon oath, that six days' notice in writing had been given to the justices, it was not competent for the parties now to supply a defect in the affidavit, upon which the certiorari had been

under which the service took place. I think the affidavit may be read.

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Bodkin. Secondly, the application to the learned Judge at Chambers on the 20th of October was in time. It was a rule of practice clearly established, that where proceedings were to be taken within a period of time to be reckoned from a certain specific act, the day on which that act was done, was to be included in the computation; but where they were to be taken within a certain time after an act done, the day on which such act was done must be excluded. He cited *Webb v. Fairman* (a), *Watson v. Pears* (b).

Dowling admitted that after the case of *Williams v. Burgess*, he could not sustain this objection.

Bodkin. Thirdly, as to the issuing of the certiorari before the Judge's fiat was obtained. He produced an affidavit, which stated that the practice had been repeatedly acted upon at the Crown Office to issue the certiorari before the Judge's fiat was procured. The application at Chambers on the 20th of October besides, was a sufficient motion or application within the meaning of the statute of 13 Geo. 2, c. 18. The party had gone to the Judge's Chambers, and, by accident, there was no Judge in town; he was entitled to go on the 20th of October, and the Court would not hold him responsible for the accidental circumstances by which he was prevented from obtaining the fiat until the 21st of October. *Rex v. Abergele* (c), shewed that the Court would not quash a writ of certiorari on a mere point of form, unless driven to do so by the necessity of the case. From a note to that case (d), it appeared that an objection similar to that now brought forward, had been there raised. There application was

(a) *Ante*, vol. 6, p. 549, O. S.;
S. C. 3 M. & W. 473.

(b) 2 Campb. 294.

(c) 5 Ad. & Ell. 795; S. C. 1
Nev. & P. 235.

(d) p. 796

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made upon the last day for the Judge's fiat. The Lord Chief Justice was out of town as were the other Judges of the Court, but his Lordship's clerk promised the agent that he would send the necessary papers to his Lordship in Derbyshire by that evening's post, and desired him to call again four days later, that being the earliest time by which it was probable the papers could be returned. On that day the application was reversed, and the fiat was obtained, bearing the indorsement of the Lord Chief Justice, and the certiorari thereupon issued, but although those facts were commented upon in argument, the Court laid no stress upon the objection. In the present case, although the order of sessions was made on the 20th of April, the sessions did not terminate until the 22nd; taking the order to date of the latter day, the signing of the fiat by the learned Judge, on the 21st of October, was in time, and the Court would take it that the certiorari had only issued upon that fiat. At all events, it was obvious that the respondents had done all they could to procure the fiat, and the Court would not deal strictly with such an objection as that which was raised to their proceedings.

Dowling, Serjt., contra. The act of Parliament was imperative in requiring that the application for the writ of certiorari should be made within six calendar months

on the last day, he had taken time to consider his decision.] There the delay would have been the act of the Judge, for which the parties would not be responsible; but this was more like the case of an application being made after the time at which it was known the Judge would leave Chambers, and unless some substantial excuse was offered for the delay, the Court would hold it to be fatal. Secondly, the certiorari could only be issued upon the fiat of the learned Judge, and unless the fiat was first obtained the writ was invalid. Thirdly, the Court would not be disposed to suffer the parties now to amend their case, by producing fresh affidavits in aid of their defective proceedings. *Rex v. Rattislaw* (a), shewed that it was competent for the appellants to bring forward this objection, and *Regina v. Spackman* (b), supported the same view. That the original affidavit of the service of notice upon the justices was defective, was clear. Such service as was sworn to would have been insufficient even in the case of a rule to compute, for in *Strutton v. Hawkes* (c), it was held that a service of a rule nisi to compute, by putting it under the door of the defendant's chambers is not sufficient, although the laundress states that the defendant will probably have the rule in the course of the day. Nor did the amended affidavit remove the objection, for although it might be that Mr. Witham had received the notice with his other letters of the 13th of October, there was nothing to shew that any of them reached him on the 13th, and it was urged that unless the notice had so reached him on that day, it would not have been in time according to the provisions of the act.

COLERIDGE, J.—Upon the two points which have been raised, one, whether this certiorari can be considered to have been properly issued before the Judge's fiat was obtained, and the other, whether it was applied for in time,

(a) *Ante*, vol. 5, p. 539, O. S.

(c) *Ante*, vol. 3, p. 25, O. S.

(b) *Ante*, vol. 9, p. 1060, O. S.

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I am inclined to consider the case. Upon the first point which was argued, namely, whether due notice of the intended application for the certiorari was served on the justices, I think that under all the circumstances this rule must be discharged. This is not a question whether or not the justices might have objected to the service, or whether the parties are at liberty to object for them; but it is simply this, whether, upon the affidavits produced on shewing cause, there is such a defect, as shews that there is no sufficient evidence of proper service of notice on the justices? It is sworn that on the 13th of October, the notice was left at the chambers of Mr. Witham; whether he was in chambers or not at the time does not appear, but it seems that there is a letter-box, and that the notice was dropped into the box, and that must be taken to be a place in which Mr. Witham invites persons to leave notices and papers. This was done on the 13th of October; the 20th was the last day on which the writ could issue; six days' notice is required; the 13th was abundantly in time; I should have considered the 14th quite soon enough. Then is the evidence sufficient which states an admission by Mr. Witham, that he "duly received" this notice with his other papers of that day? The question turns upon the fair interpretation to be put on those words. The affidavit now produced could not be answered, it is true; but if materials existed to shew that the notice did not reach the hands of Mr. Witham in time, they might have been brought forward in the first instance. I think it may be fairly taken that Mr. Witham received the notice, at all events on the day following that on which it was left.

Cur. adv. vult.

COLERIDGE, J., on the 11th of May delivered judgment. In this case there were some points raised which were disposed of on the argument, but there were other questions which I desired to consider before I gave my judgment. It was a motion to quash the allowance of a writ of

certiorari to remove a case, granted by the justices at sessions, to this Court, the justices having made their order, subject to the decision of such case. The statute 13 Geo. 2, c. 18, s. 5, requires that the application for the certiorari shall be made within six months after the order shall have been made. The order in this case was made on the 20th of April, and the last day on which the certiorari could issue was the 20th of October. It appeared that on that day the attorney took an affidavit to the Judge's Chambers for the purpose of having it sworn, and of obtaining a fiat for a certiorari. It so happened that no Judge was in town, and the affidavit was sworn before a commissioner at Chambers, and it appears that the attorney then went to the Crown Office and got a certiorari, without any Judge's fiat warranting the issue of such writ. On the following morning he went again to the Judge's Chambers, and then obtained a Judge's signature to the fiat. The point mainly argued on the discussion of this rule was, whether this was an application within the words of the statute: the application, in point of fact, not having reached the Judge until the 21st. But it seems to me to be unnecessary to decide that point, because I am of opinion that the certiorari must be quashed upon another ground, which was not so much depended upon, but which was brought before the Court—I mean, upon the ground that it was issued before the fiat was signed. No authority was cited on this point, but it was stated that it was very much the practice to issue a certiorari in the first instance, and to get the fiat, which is the authority for the certiorari, signed at a subsequent time. But if such a mode of proceeding is contrary to law, the course of practice cannot be allowed to prevail. I find that there is a case of *Regina v. White* (a), where a procedendo was granted under circumstances similar in this respect to those of the present case. There, a certiorari was granted to remove an order of sessions, and a motion

1843.
REGINA
v.
ST. MARY,
WHITE-
CHAPEL.

(a) 1 Salk. 150; Holt, 132.

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REGINA

v.
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was made for a procedendo, "because the writ was made out on the Saturday before the Term, teste the 12th of February, and the fiat was not signed till the first day of the Easter Term, and a procedendo was granted for the irregularity." In that case, therefore, the certiorari was issued in Hilary Term; the fiat was obtained in Easter Term, and a procedendo was granted for the irregularity. *Holt*, C. J., in giving judgment, said, "If the fiat had been signed on the same day the writ was taken out, that would have been well: because it was before the essoin day; but a fiat signed this Term cannot warrant a certiorari tested the last day of last Term." It seems to me, therefore, that where a certiorari is issued before the fiat is signed, the issue of the certiorari is unwarranted. Here the facts are clear that the certiorari was issued on the 20th of October, and that the fiat was not signed until the 21st. Therefore, I think that this rule must be made absolute for quashing the writ, but, of course, without costs, as the practice which was here acted upon appears to have prevailed in the office.

Rule absolute, without costs.



and issue execution, upon the determination of the tenancy by a notice to quit, the particulars of which were specified. The affidavit on which the motion was made, stated that a notice to quit, bearing date the 31st of July, 1842, had been served upon the tenant on the 1st of August in the same year, requiring him to give up possession of certain lands, mentioned in the warrant of attorney, on the 1st of February in the present year, and of certain buildings, also mentioned, on the 1st of May; that the tenant had given up possession of the lands, but had refused to quit possession of the buildings. It was submitted that although no cases of a similar description were to be found in the books, there could be no objection to such a warrant of attorney being given, nor to judgment being entered up, and execution issued thereon.

1843.
 Doe dem.
 BEAUMONT
 v.
 BEAUMONT.

COLERIDGE, J.—If a party enters into such an agreement, I see no reason why it should not be enforced.

Rule granted.

In Trinity Term,

Hugh Hill renewed his motion for judgment under the following circumstances. The former application had been made upon the affidavit of the attesting witness to the instrument, but upon further examination, it appeared, that the original instrument had not been filed, but a copy only. It was sworn that the warrant of attorney had been prepared and duly executed in Yorkshire, and had been sent to town for the purpose of being filed; but a copy having been made of it, the copy had been filed by mistake, instead of the original. Search had been made for the original, but without success, and it was sworn that the attesting witness was now dead, and, therefore, could not make a fresh affidavit.

1843.

DoE dem.
BEAUMONT
v.
BEAUMONT.

WIGHTMAN, J., granted the application ; but

Hill, being unprepared with a fresh affidavit that defendant was alive, the rule was on this ground stay until the production of such an affidavit.

Rule accordingly

DAY v. HOLLY.

Where on the eighth day after the service of a copy of a writ of summons, such eighth day being the first day of Term, an application was made in Court, to set aside the service, on the ground of irregularity, it was held, that the motion was regular, and that the defendant was not bound to have gone to Chambers in the intervening period.

A copy of a writ of summons served upon a defendant, and not having the indorsement of the memorandum, "this writ is to be served within four calendar months," &c., is irregular, and will be set aside.

F. GUNNING shewed cause against a rule obtained *Petersdorff*, for setting aside service of the copy of a writ of summons for irregularity, with costs. The ground of motion was, that the copy of the writ served did not bear the indorsement, "This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards." It was now urged that this indorsement formed no part of the writ itself; but that it was a mere memorandum in the nature of a warning to the plaintiff, and that its omission in the copy served was immaterial. But this motion had been made too late. *Hinton v. Stevens* (a) shewed, that if a copy of a writ of summons served in Vacation, objection to it for irregularity must be taken in Vacation, if there is time for that purpose. Here the writ had been served on the 11th of April, and no application had not been made until the 19th, which was the first day of Term, (the commencement of the sittings in banco having been postponed to that day in consequence of Easter falling within the Term.) It was submitted that the defendant was bound to have gone to Chambers.

Petersdorff. The defendant had eight days within which to make his application ; he was entitled, therefore, to co

(a) *Ante*, vol. 4, p. 283, O. S.

to the Court on the last of those eight days. [*Wightman, J.*—That objection cannot prevail; if the party is in time to come to the Court, he is entitled to do so.] Secondly, the copy of the writ served, was clearly irregular, for the memorandum was required by the form given in the schedule to the 2 Wm. 4, c. 39, to be subscribed to the writ, and the plaintiff was bound to serve him with a true copy.

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DAY
v.
HOLLY.

WIGHTMAN, J.—That act is imperative in requiring the indorsement; and unless the copy served bears the indorsement, it is not a true copy. The rule must be made absolute.

Rule absolute, with costs.

Doe dem. **GOODLAND and Others v. FRANKLIN.**

KINGLAKE moved for a rule, calling upon the lessors of the plaintiff in this action to shew cause why they should not pay back to Mr. O., their attorney, the costs of the taxation of his bill of costs, and why the rule of Court, directing such taxation upon the ordinary terms, should not be rescinded. It appeared, that the lessors of the plaintiff were churchwardens and overseers of a certain parish, and that the present action had been brought in their name, to eject the defendant from certain premises which he held, belonging to the parish, and which by the 59 Geo. 3, c. 12, were vested in the lessors of the plaintiff, as such parish officers. The cause being at an end, the bill of costs of Mr. O. was referred to taxation by an order of a learned Judge, afterwards made a rule of Court, upon the usual terms, that if more than one-sixth should be taken off, the attorney should pay the costs of taxation.

Where in an action of ejectment by parish officers, the bill of costs of the attorney for the lessors of the plaintiff, was referred to taxation upon the ordinary terms, and the Judge's order by which the reference was made, directed that the existing officers of the parish should sign the undertaking to pay what should be found to be due to the attorney, but the undertaking was, in

fact, signed by the persons who had been in office when the action was commenced, and upon taxation, more than one-sixth was taken off: the Court refused to set aside the taxation, upon the ground that the undertaking was not signed in accordance with the Judge's order.

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Doce dem.
GOODLAND
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By the order, it was also directed that an undertaking should be signed by the present churchwardens and overseers, to pay to Mr. O. what should be found to be due upon taxation. The undertaking was signed by the parish officers who were in office at the time of the commencement of the action. The taxation took place, and more than one-sixth was taken off, and the costs of taxation were, therefore, taxed against the attorney. It was now admitted, that the undertaking did not follow the order of the learned Judge, and that the attorney was entitled to set aside the taxation upon that ground. *Howard v. Groom* shewed that the attorney had not waived his right to object to the undertaking, by appearing before the Master at the taxation. *Rogers v. Peterston (b)*, and *Hoby v. Pritchard* were to the same effect. That the undertaking here was objectionable was clear, for, first, it was not in accordance with the Judge's order, and secondly, it was not binding upon the persons who signed it. They were parties to the action only by virtue of their office, but that had ceased, and supposing any liability to have accrued against them they would have been unable to deal with the parish property, so as to have paid the applicant what was due to him.

COLERIDGE, J.—I think that there ought to be no objection in this case. It is an application after taxation has been made, had, on and previous to which taxation an undertaking was given by four persons, which undertaking was binding on them. The applicant has had the benefit of that undertaking, so far as it secured to him the payment of what should be found due. Two cases have been cited in support of the application, both of which are distinguishable from the present. The first, *Howard v. Groom*, was a case where there was no undertaking given, and there no motion being made after taxation, it might be said that

(a) *Ante*, vol. 4, p. 21, O. S.(c) *Ante*, vol. 5, p. 301, O. S.(b) *Ante*, vol. 7, p. 187, O. S.; S. C. 2 M. & W. 124.

S. C. 4 M. & W. 588.

attorney had waived his right; therefore the case was as if the attorney had said, "I agree to go into this taxation, not having any undertaking; but in doing so, I do not waive my right to object that the reference to taxation was unauthorized," and that was the objection which was there made. That is not the case here, because the attorney has had the benefit of the undertaking given by four persons. In the other case, *Rogers v. Peterston*, there had been no undertaking whatever; and if the applicant, in this case, had stopped at the beginning, and had said, "I object to this undertaking," he would have had a right to do so, and to have succeeded on that objection. He has not done so, however; but he has gone on with his taxation, and having taken the chance of what it might be, and having had the substantial advantages deriveable from an undertaking, he now seeks to turn round to get rid of his liability.

1843.
Doe dem.
GOODLAND
and Others
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FRANKLIN.

Rule refused.

SALMON v. TUGMAN.

WORLLEDGE had obtained a rule, calling upon the plaintiff in this action to shew cause why, on payment of 1*l.* 17*s.* 6*d.*, all further proceedings should not be stayed. It was an action of debt for 14*l.* 3*s.* 3*d.*, to which the defendant pleaded *nunquam indebitatus*. The action was tried before the under-sheriff for the county of Norfolk, where the plaintiff obtained a verdict for 1*l.* 17*s.* 6*d.* only. The present rule had been obtained upon an affidavit, that the cause of action arose within the county of Norfolk, and

Where upon the trial of an action of debt before an under-sheriff, the plaintiff recovered less than 40*s.* damages, the Court refused to stay all further proceedings in the suit after the verdict upon payment of the

amount of the verdict without costs, upon a suggestion that the cause was triable in the county Court; and *semble*, that where in an action the plaintiff seeks to obtain an order for the trial of the cause before the under-sheriff, under the 3 & 4 Wm. 4, c. 42, s. 17, and the defendant anticipates that less than 40*s.* will be recovered, the defendant should seek to ingraft upon the order the Term, that in such an event the plaintiff shall have no costs; for, after trial, the Court will not exercise its equitable jurisdiction to deprive the plaintiff of such costs, notwithstanding the statute 43 Eliz. c. 6, s. 2.

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that the defendant was liable to be warned, and summoned to the county Court. The object of the motion was to deprive the plaintiff of his costs of suit, upon the ground that the action was properly triable in the county Court.

Gray now shewed cause. The plaintiff, by his particulars of demand, gave credit for 1*l*. 16*s.*, which had been originally due, besides the amount claimed in the declaration. The jury, by their verdict, had shewn that the plaintiff, but for the reduction of his demand by 1*l*. 16*s.*, would have been entitled to a total sum of 3*l*. 3*s.* 6*d.* The jurisdiction of the county Court, however, extended only to debts under 40*s.*, and as the plaintiff must have declared for the entire 3*l*. 3*s.* 6*d.*, the action could not have been brought in that Court. It was sufficient for the plaintiff to shew that it would be matter of doubt whether he was compelled to proceed for the total amount, to entitle him to bring his action in the superior Court. *Collins v. Aaron* (a) and *James v. Lingham* (b) were referred to. Secondly, it was not competent to the defendants to come to the Court with the present application, in a case where the jurisdiction of the inferior Court was a common law jurisdiction, and where such an application was not distinctly authorized by the terms of an act of Parliament. By the statute of Gloucester, (6 Ed. 1, c. 1,) the general

inferior Court, to whom a cause is sent by writ of trial, under the 3 & 4 Wm. 4, c. 42, s. 17, has no power of certifying under the statute of Elizabeth. This case had been tried before the under-sheriff, and if the Court should grant the present application, the effect would be, that it would repeal the statute of Gloucester, and reverse the decision in that case. In *Jones v. Barnes* (a), the decision in *Wardroper v. Richardson* was supported, and Parke, B., threw out the suggestion, that if the action was brought for less than 40s., that fact should be shewn for cause before the Judge, on the application to have the cause tried before the sheriff. The reason for that suggestion was, that a Judge at nisi prius, having the power to certify under the statute of Elizabeth, the plaintiff might by that means be deprived of the costs of a vexatious proceeding.

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Worlledge, in support of the rule. *Freeman v. Crafts* (b) shewed that this suit should properly have been brought in the county Court. The main question was, whether the present application to the equitable jurisdiction of the Court ought not to succeed. The suggestion thrown out by Parke, B., in *Jones v. Barnes* was hardly conclusive; and *Branker v. Massey* (c), seemed to shew that such an answer to an application for a writ of trial could not be successful, if the plaintiff chose to assert that more than 40s. was due. There, on an application to set aside proceedings as *infra dignitatem*, on an affidavit that the demand sued for was less than 40s., the Court refused to inquire into the amount, an affidavit being produced on shewing cause, stating that the demand exceeded that sum.

WIGHTMAN, J.—I am of opinion that this rule must be discharged. From the statute of Elizabeth, it is clear that the plaintiff is entitled to his costs, because that statute

(a) 2 M. & W. 313; S. C. S. C. 4 M. & W. 4.
Ante, vol. 5, p. 455, O. S. (c) 2 Price, 8.
 (b) *Ante*, vol. 6, p. 698, O. S.;

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seems to recognise the general costs, if they recover damages right in particular cases. and *Jones v. Barnes*, it seems of an inferior Court, possibly deprive the plaintiff of costs therefore, in actions tried before just as if the statute of Elizabeth interfere, therefore, in this subsisting rights of the opinion, cannot so interpose defendant, in such a case, is that he may always oppose the ground here set up. upon the case of *Branker v* with me, because it might be order for the writ of trial, the costs, if he recovered less than

REGINA v. The May

Where on the 16th of November, 1841, a rule nisi for a mandamus was obtained, which was made absolute on the 17th of April, 1842, and a return was made on the 14th of May following, and the prosecutor took no further steps down to the following November, and then, upon application, refused the Court granted a rule, and in the following Easter ' pay the costs of the writ, unless, by the first day of the or impeach the return which had been made.

THE ATTORNEY GENERAL rule, calling on the prosecutor to pay the costs of opposing damus. The application was c. 21, s. 6, which provides, ' for any writ of mandamus application, whether the writ and also the costs of the writ and obeyed, shall be in the the Court is hereby autho

whom and to whom the same shall be paid." In the present case, it appeared that the object of the writ was to compel the officers of the corporation of Dartmouth to place the name of the applicant upon the roll of burgesses. The affidavits shewed that on the 16th of November, 1841, Mr. Holdsworth, the prosecutor, applied to the Court for a rule nisi for the writ of mandamus; on the 17th of April, that rule was made absolute, and the writ, having been issued, was served early in the month of May. On the 14th of May, the return was filed, stating that Mr. Holdsworth was not duly qualified to be placed on the burgess roll. No further steps were taken in the case, because, as it was suggested, the time for voting would now shortly again arrive, and even if the prosecutor should succeed in this instance, he might obtain no permanent benefit. On the 12th of November, an application was made for the costs now demanded, which was refused, and the present rule was thereupon obtained. It was now submitted that the Court would not compel Mr. Holdsworth to pay costs. The effect of doing so, would be that the Court would pledge its opinion that Mr. Holdsworth was bound to have proceeded with the prosecution of his writ. It would have been useless for him, at the time he abandoned the writ, to have gone on any further; for to do so would be, in effect, to try in 1843 whether or not he was entitled to a right, his power to exercise which, had ceased with the month of November, 1842. If the Court saw that the original proceedings had been taken *bonâ fide*, they would not grant this application. But, further, no final decision of the case had been arrived at, and the return might be false; and even if the present application were granted, Mr. Holdsworth might still bring his action for a false return. Nay, more, he might even still traverse the return itself, and upon such traverse he might eventually succeed. The case was this in point of fact, that the mandamus was not yet disposed of, and it was not within the meaning of

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the Act, which provided only for cases where the writ should be granted or refused, or issued and obeyed.

Kelly and Butt, in support of the rule. The present rule must be made absolute, for it could not be contended that Mr. Holdsworth was entitled to hang up the process on this mandamus for ever, and if he omitted to proceed with proper diligence, it must be presumed that he had no hope of success. In the case of *Regina v. The Mayor, &c., of Newbury* (a), it was held, that the argument and judgment on return to a mandamus that the Court will give costs to the party succeeding under 1 Wm. 4, c. 21, s. 6, unless very strong grounds of exception be shewn on the other side. [*Wightman, J.* (b).—I am told that there is no instance of any motion like the present for costs, unless the mandamus has been disposed of. Do not your rule have called on the prosecutor either to pay the costs or to proceed?] It was submitted that after a lapse of so long a time, it must be presumed that Mr. Holdsworth did not intend to proceed. The option was suggested had, however, been tendered to him at first, before this application, he had been called upon to pay the costs; had he possessed an intention to proceed, he would have gone on after that demand. It was besides obvious from the answer to the present rule, that he had no intention to proceed. [*Wightman, J.*—I am told that it is the practice of the Court, the defendant may still take this return; if that be so, surely the party cannot be allowed to hang up the process upon pay costs, for, as yet, he is not the unsuccessful party]. The Court, at all events, would not mould the rule so as to compel the party either to proceed at once or to admit that he must be unsuccessful and abandon his proceedings, and, in the latter event, would compel him to pay costs.

(a) 1 Q. B. 751; S. C. 1 G. & Dav. 388.

(b) After consulting with Mr. Robinson of the Crown Office.

WIGHTMAN, J.—I think that this rule should be made absolute, unless the party traverses or impeaches the return before the first day of next Term. It would have been better had this application been made with the alternative that I have suggested, but I think that the present applicants are entitled to know when the proceedings against them are likely to terminate.

Rule accordingly.

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&c., of
DARTMOUTH.

ROSS v. CLIFTON and Others.

BUTT moved for a rule, calling upon the defendants to shew cause why the judgment signed and execution issued in this action should not be set aside, and why it should not be referred to the Master to review his taxation of costs. It was an action on the case, and the first count claimed a right to a drain or water-course attached to certain premises, of which one T. was tenant, the reversion belonging to the plaintiff, and alleged an injury by reason of the obstruction of the same by the defendant; the second count claimed a right for the rain-water from the roof of the plaintiff's house to descend and fall into the said drain, and also the right to a chimney through which the smoke from a certain room in the plaintiff's house ought to pass; and alleged that the defendants had wrongfully erected materials against a wall of the plaintiff's house, whereby the wall was weakened and the passage of water and smoke through the drain and chimney obstructed. The defendants pleaded; first, not guilty; secondly, to the first count, a denial of the tenancy and of the plaintiff's reversionary interest; thirdly, to the first count, a traverse of the plaintiff's right to the drain; fourthly, to the second count, a like plea to that secondly pleaded; fifthly, to the second count, denying the alleged

Where to an action on the case for injuring certain easements and also a wall belonging to a house in which the plaintiff claimed a reversionary interest, and the defendant pleaded, not guilty, and several pleas, denying the plaintiff's reversionary interest, and also his title to the rights which he claimed, and the injury to the wall, and the cause having been referred, the costs of the cause to abide the event, the arbitrator found for the defendant on the general issue, and also on the plea denying injury to the wall,

but found the remaining issues for the plaintiff, and assessed nominal damages thereon; it was held, that the defendant was entitled to the general costs of the cause, for that the assessment of damages to the plaintiff might be treated as surplusage.

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and Others.

right for the rain-water to pass through the drain ; sixthly, as to so much of the second count as related to the wall, and the cause of action in respect thereof, that the wall was not the wall of and parcel of the said dwelling-house ; the seventh, eighth and ninth pleas were framed under the provisions of the Building Act, 14 Geo. 3, c. 78 ; the tenth plea denied the right of the plaintiff, as in the second count alleged, to the chimney for the passage of smoke. Issue being joined upon these pleas, the cause went down to trial when a verdict was taken, by consent, for 200*l.* damages costs 40*s.*, subject to a reference ; and the order of nisi prius directed the costs of the cause to abide the event, and the costs of the award to be in the discretion of the arbitrator. By his award the arbitrator directed, that on the first and sixth issues the verdict should be entered for the defendant but found that on the remaining issues the plaintiff was entitled to a verdict with 7*s.* damages ; the award further directed that the verdict taken at the trial should be reduced to the sum of 7*s.* The Master taxed the costs of the cause to the defendants, and thereupon judgment was signed and execution issued. It was objected, however, that the Master had come to an erroneous conclusion, for that the legal event of the cause was not in favour of the defendants. The award was inconsistent in directing a verdict for the defendants on the issue on not guilty, and for the plaintiff on seven of the issues, with damages upon those issues. If after a trial the *postea* had been made up in accordance with the award in this case, there must have been an application to the Judge, who had presided at the trial, to amend it ; here, however, the arbitrator was *functus officio*, and no such application could be made to him. [*Wightman, J.*—If the plaintiff finds fault with the award, he may apply to set it aside ; but at present it seems to me, that he cannot succeed on the objection which he seeks to raise. There is, I think, a general finding for the defendant, and the assessment of damages to the plaintiff may be rejected as surplusage]. As the record now stood, it was obviously open

to objection, and a writ of error might lie upon it. *Grout v. Glasier* (a), shewed that the award was bad.

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and Others.

Cur. adv. vult.

WIGHTMAN, J.—I think there should be no rule in this case. *Benett v. Coster* (b), seems to me to govern my decision. There the general issue was found for the plaintiff, with 1s. damages, and other pleas, of justification, were found for the defendant, and the defendant was held to be entitled to the general costs.

Rule refused (c).

- (a) *Ante*, vol. 1, p. 58, N. S. (Bunce,) that Lord Abinger, C.
(b) 1 B. & B. 465; S. C. 4 B., had given a similar opinion
Moore, 110. in the case at Chambers.
(c) It was stated by the Master,

SARJENT v. BROWN.

R. V. RICHARDS had obtained a rule, calling on the plaintiff to shew cause, why the execution of the writ of inquiry of damages, in this action, should not be set aside, with costs. It was an action of debt brought to recover a sum of 55*l.* 10*s.*; the defendant suffered judgment by default, and a writ of inquiry of damages was issued by the plaintiff, and notice of the execution of the writ given for the 26th of April. Some negotiations were opened between the parties, with a view to the settlement of the action, and on the 24th of April the defendant took out a summons at Chambers, returnable on the 25th, calling upon the plaintiff to shew cause, why, on payment of 11*l.* 3*s.* 6*d.*, together with costs down to the 20th of April,

Where after judgment by default, a summons was taken out for a stay of proceedings in the action, on payment of debt and costs, on the 24th of April, returnable on the 25th, but before it was returnable, it was agreed between the parties, that the hearing should be postponed until the afternoon of the 26th; and

on the morning of the 26th, the plaintiff executed a writ of inquiry of damages, of which notice had been previously given: *Held*, that such execution was bad, and must be set aside: for that the summons operated as a stay of proceedings from the time at which it was originally returnable on the 25th.

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all further proceedings summons was duly served on same day, by the mutual consent was adjourned until the 2d of the afternoon. On the morning inquiry was executed at B. damages at 55*l.* 3*s.* The question which arose upon the adjournment of the 26th of April, operated meanwhile, or whether the effect from the time appointed day?

Byles, Serjt., shewed that in the first instance, attendable to the effect of the adjournment at the time at which it was made, before, admitting that its effect from the time at which it was made of the writ of inquiry was the execution of the writ of the day on which it was the appointment to hear at noon.

Richards, contra. It was of the hearing of the summons had taken place at the despatch this was not denied. His therefore, was in breach of

COLERIDGE, J.—I think absolute. The summons, in fact, have been a stay of process against the plaintiff, on whom it was hearing might be postponed

not been agreed to, and the plaintiff had not attended the summons, the defendant would have been at liberty to take out another summons for a subsequent day. But still the stay of proceedings would have dated from the time at which the first summons was returnable. I think, therefore, the stay of proceedings must still be dated from the 25th of April, and that the execution of the writ is, consequently, bad.

Rule absolute.

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COURT OF EXCHEQUER.

Easter Term.

IN THE SIXTH YEAR OF THE REIGN OF VICTORIA

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STAVERT v. EASTWOOD.

A declaration stated that the plaintiff being possessed of a bill of exchange, by a certain agreement, defendant bought of the plaintiff, and the plaintiff bargained and sold to the defendant the said bill for 200*l.*, and it was agreed that upon one E. handing over to the plaintiff the said sum of 200*l.*, the said bill should be delivered to E. It then alleged mutual promises, and that the plaintiff was ready and willing to deliver the bill, and that although the defendant had paid 50*l.*, parcel of the 200*l.*,

ASSUMPSIT. The declaration stated that the plaintiff being possessed of a bill of exchange, drawn by one Sam Eastwood upon and accepted by J. Shaw, payable to Eastwood's order, for 200*l.*, and by him indorsed to G. Elder, and by G. Elder indorsed in blank, and a in bankruptcy having issued against G. Elder, by a certain agreement made between the plaintiff and defendant the defendant bought of the plaintiff, and the plaintiff gained and sold to the defendant the said bill of exchange for the sum of 200*l.*, and by the said agreement it was agreed between the plaintiff and defendant that upon one Geo Elder handing over to the plaintiff the said sum of 200*l.* the said bill of exchange should be delivered over to the G. Elder; and the defendant thereby further agreed, that if the estate of the said S. Eastwood paid more than 10*s.* the pound under the said fiat, he, the defendant, would to the plaintiff all that the estate realized more than 10*s.* the pound upon the amount of the said bill of exchange that thereupon, in consideration of the said agreement, that the plaintiff then at the request of the defendant promised the defendant to perform the said agreement

yet, (although requested so to do,) he had not paid the residue: *Held*, bad, for want of averment that a reasonable time had elapsed, notwithstanding the defendant had pleaded ov

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all things on his part to be performed, the defendant then promised the plaintiff to perform the same in all things, on his, the defendant's part, to be performed: that although the plaintiff had always from the making of the said agreement been ready and willing to perform the same in all things on his part, and to deliver the said bill of exchange to the defendant or the said G. Elder, upon payment to him, the plaintiff, of the said sum of 200*l.* according to the said agreement, and although the defendant after the making of the said agreement, to wit, on the 10th day of October, 1841, did pay to the plaintiff in part performance of the said agreement on his part the sum of 50*l.* parcel of the said sum of 200*l.*, yet the defendant disregarding his promise had not although often requested so to do, paid to the plaintiff the residue of the said sum of 200*l.* or any part thereof, but had neglected, and still neglected and refused so to do; nor had the said G. Elder paid the plaintiff the residue or any part thereof or any part of the said sum of 200*l.* and the sum of 150*l.* still remained wholly due and unpaid to the plaintiff.

The defendant having pleaded a plea which was clearly bad, and to which the plaintiff demurred, the defendant joined in demurrer, and objected that the declaration was insufficient, inasmuch as it did not allege a promise to pay on request or any promise to pay the sum of 200*l.*, the non-payment of which on request was the breach alleged, nor was any such promise necessarily to be inferred from the agreement, the utmost that could be inferred being a promise to pay on delivery or within a reasonable time.

Addison, for the defendant. The delivery of the bill and the payment of the money were concurrent acts, and the declaration should have alleged a tender of the bill or have shewn that the defendant had waived it. The case resembles *Morton v. Lamb* (a), which was an action for the non-de-

was not bound to pay the money to him. It cannot be his right to a tender of the mere act of doing to discharge the plaintiff the contract. The allegation does not cure the defect if the defendant had notice. It is not shewing that the plaintiff is the defendant's part of the contract to do any act where he is to perform the act within a reasonable time. He must allege that a reasonable time is

Cowling, contra. The demurrer. It is in effect a denial that the goods bargained and sold were the goods to which the plaintiff is entitled to allege that a reasonable time is a reasonable time of the money, since that is the case. Here, the property in the goods is transferred to the defendant, and he is bound to pay the money, *Bach v. O'Connell*. On this point, the law is distinguishable, for the plaintiff can pass only by indorsement. The difficulty is, that it is not the performance of the contract, but the payment of the money.

Cowling consented to the suggestion of the Court, and obtained leave to amend.

Amendment accordingly.

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LEWIN and Another v. HOLBROOK.

THIS was an action by landlord against tenant for dilapidations. After issue joined, the cause and all matters in difference were referred to arbitration by a Judge's order, dated the 18th of March, 1841, whereby the arbitrator was required to "make and publish his award in writing of and concerning the matters referred, ready to be delivered to the said parties or to either of them, or if they or either of them should be dead before the making of the said award, to their respective personal representatives, who should require the same on or before the first day of Trinity Term next ensuing the day of the date thereof, or before any other day to which the said arbitrator should by any writing under his hand from time to time enlarge the time for making his said award." It was also provided, "that the arbitrator should be at liberty, if he should think fit, to examine the parties to the suit, who were to produce before him all such books, deeds, papers and writings in their or either of their custody or power relating to the matters in difference as he should require." Several meetings took place before the arbitrator, and on the 27th of December, 1841, the defendant died. During the month of January following the plaintiffs' attorney requested the arbitrator to proceed with the reference, but he refused to do so because there was no personal representative of the defendant. In the month of August, the defendant's will was proved in the Perogative Court of Canterbury, by Elizabeth Holbrook, the widow and sole executrix of the defendant; and the arbitrator appointed a meeting for the 6th of January, 1843, notice whereof was given to the defendant's attorney. The plaintiffs accordingly attended by counsel, but no one ap-

A cause was referred by Judge's order, which required the award "to be delivered to the parties, or either of them, or if they or either of them should be dead before the making thereof to their personal representatives." After several meetings, the defendant having died: *Held*, that the Court had no power to direct the arbitrator to proceed with the reference.

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peared on the other side, and the arbitrator stated, that he had received notice from the defendant's attorney not to proceed with the reference, as the cause had abated by the death of the defendant. The arbitrator having accordingly declined to proceed,

Montagu Chambers moved for a rule to shew cause why the arbitrator should not proceed with the reference, to make and publish his award in writing of and concerning the matters referred to him as if the defendant were living. Though in ordinary cases the death of one of the parties operates as a revocation of the arbitrator's authority, yet in this case such contingency is expressly provided for by the order of reference, which enables the arbitrator to deliver the award to the personal representatives. [*L. Abinger, C. B.*—In order to proceed with the reference the arbitrator must have the power of compelling the executor to appear before him, but I do not see how an agreement made by the defendant in his lifetime can bind his personal representative]. It was evidently the intention of the parties that the death of either should not operate as a revocation of the arbitrator's authority, and if he proceeds his award will be good, though it could not be enforced by attachment. [*Parke, B.*—The effect of the argument is that the personal representative shall pay any sum of money found due from the defendant either in his lifetime or after his death. That binds the assets of the defendant like any other simple contract].

Kelly was to have shewn cause in the first instance.

Rule refused

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WILLIAMS v. MOOR.

DEBT for work and materials, for goods sold and delivered, for interest, and for money due on an account stated.

Plea: Infancy of the defendant.

Replication, that the defendant before the commencement of the suit, to wit, on the 10th day of December, 1837, attained his full age of twenty-one years, and before the commencement of the suit, to wit, on the 27th day of September, 1839, in writing, then signed by him, assented to and ratified and confirmed the said contract in the declaration mentioned, and then agreed to pay the plaintiff the said monies therein mentioned. Verification.

To debt on an account stated the defendant pleaded infancy, to which the plaintiff replied a ratification by defendant, after he came of age: *Held*, that "debt," might be maintained.

Quære, as to whether the ratification should not have been pleaded by way of new assignment.

Special demurrer, assigning for causes, that the replication admitted that the defendant was an infant at the time of stating the account, and that an infant, though he state an account, cannot be sued upon it: that an infant could not ratify such a contract after he came of age, or be liable in consequence of such subsequent ratification, or on an account stated when he was a minor: that the action should have been in assumpsit, not debt: that an infant was not liable for interest.

Erle (*Montague Smith* with him), in support of the demurrer. An account stated by an infant is not merely voidable but absolutely void, and cannot form the consideration for a subsequent promise, *Trueman v. Hurst* (a). [*Parke*, B.—Is there any distinction between an account stated and a claim for goods sold and delivered which were not necessities? An infant can ratify a debt for them]. In the case of goods sold he would have received value, and the authorities shew that where there has originally been a consideration, an infant may ratify the contract, but it is different with respect to an account stated, which may have

(a) 1 T. R. 40.



recovered when the particular items were not sustainable. At all events, admitting the subsequent ratification to be valid "debt" cannot be maintained, but the proper form of action is *assumpsit*.

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Petersdorff, *contra*. An account stated with an infant stands on the same footing as any other claim against him which is not for necessaries. A distinction has been attempted to be raised as to void or voidable contracts of an infant, but in truth no such difference exists. Every contract made by an infant is valid, unless he elects to treat it as void, by pleading his infancy. An infant may confirm a bond by an instrument of as high a nature, *Baylis v. Dineley* (a), and even as to money lent he may be responsible on a subsequent promise, *Ball v. Heskett* (b). [*Alderson*, B.—In *Com. Dig.* tit. *Infant* (C) 2, money lent is put as an instance of a void contract.] In *Thornton v. Illingworth* the claim was for goods sold for the purposes of trade, yet it would seem that the plaintiff might have recovered if the ratification had been before action brought. [*Parke*, B.—In *Ball v. Heskett* the account stated formed a good consideration for a new promise after the defendant came of age. In this case, instead of a replication should there not have been a new assignment?] A new assignment is equivalent to a statement that the plaintiff is proceeding for a different cause of action than that pleaded to, but here it is alleged that the defendant affirmed a prior contract, and that must relate to a liability in respect of the contract upon which the plaintiff sues. Before the new pleading rules infancy could have been given in evidence under the general issue, and then the plaintiff might in reply have shewn either that the contract was for necessaries, or a subsequent confirmation of it. This replication gives effect to the original contract. In *Hunt v. Massey*, which was an action on a bill of exchange given during infancy, Lord

(a) 3 M. & Sel. 477.

(b) Comb. 381.

defendant has ratified.
he has rendered valid w
that he, except by a val
invalid if he was then
alleged merely that he r
been different, but it all
Wharton (b), was a case c
and for money due on a
defendant pleaded infancy
quent ratification, but
replication or the form
it was held that a plea i
an infant co-acceptor of
to the objection that "de
the subsequent ratificati
be enforced either by de
answers the excuse set
existing debt.

Erle replied.

PARKE, B., delivered t
stating the pleadings hi
necessary in the present
the precise legal operati

as a new contract voluntarily entered into, the consideration being merely a duty arising from the previous transaction. The course of pleading in the cases of *Thornton v. Illingworth* and *Hartley v. Wharton*, the latter being an action of debt following that which was adopted in *Cohen v. Armstrong*, would rather seem to indicate that the effect of it was to set up and give validity to otherwise voluntary contracts. That pointed out by the Court of King's Bench on the other hand, in *Cohen v. Armstrong*, as the old form of pleading, would lead to the inference that the liability of the defendant arose on a new contract made after the age of twenty-one. The observations of Lord Mansfield in *Hawkes v. Saunders* (a), and *Trueman v. Fenton* (b), and of Lord Holt in *Hyleing v. Hastings* (c), and also in *Ball v. Heskett*, throw some light upon this subject. Whichever form of pleading may be adopted and whatever the precise legal nature of the ratification may be, it is clear that a declaration for goods sold and delivered only without any count on an account stated, and a ratification by the defendant after he has attained his majority, would entitle the plaintiff to recover. But the argument on the part of the defendant was, that this case is different, being an action on an account stated: for that an account stated by an infant is not merely voidable but actually void, so that no subsequent ratification can make it of any avail. We can, however, see no sound or sensible distinction in this respect between the liability of an infant on an account stated and his liability for goods sold and delivered, or on any other contract. The contract of the infant for goods sold and delivered, not being necessities, is as completely void as his contract on an account stated, if by the word "void," incapable of being enforced is meant, for the plea of infancy will be a bar to any demand on the one contract as well as on the other. If, however, in the word "void," incapable of being ratified is included, then we can discover no such consequence. The principle

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(a) 1 Cowp. 298.

(c) 1 Ld. Raym. 389.

(b) 2 Cowp. 547.

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on which the law allows a party who has attained twenty-one years to give validity to contracts made during his infancy is, that he is supposed to have acquired power to decide for himself whether the transaction is of a meritorious character, and which in good conscience ought to be viewed by him as binding. The defendant stated that he had nothing to take an account stated out of that principle. It was argued for the defendant, that on a case stated the infant derived no benefit, that he does not get the purchase of goods, get anything valuable, and does not give any quid pro quo. That is a fallacy; an infant on a case stated gets the same consideration as an adult, and it is certain that which was previously uncertain between the infant and the person with whom he is taking the account gets rid of the necessity of preserving vouchers. In the case of an adult, a sufficient consideration to discharge a debt, and we can discover no reason why it should not have the same effect in the case of an infant, supposing the infant to adopt and ratify it after he comes of age. If a person having had dealings with an adult meets and takes an account with him during his infancy, and in the way the balance is struck and the vouchers are destroyed, he does that which creates no legal liability on the infant. But if on attaining twenty-one he is satisfied of the justice of the settlement, there seems to be just the same reason why he should be permitted to confirm that settlement and render himself liable for the balance, as there is for an adult to make himself liable on any other contract he enters into during infancy. The same principle applies to the case of work and labour, or of goods sold and delivered. Upon principle, therefore, the defendant cannot succeed in his proposition, neither do the cases cited bear it out. It is clearly shewn by the authorities to which we were referred that an infant cannot state an account so as to bind himself, so neither can he render himself liable on any other contract not for necessities. The case of *Trueman* was an action of assumpsit on an account stated, :

plea of infancy the replication was for necessities. This replication was held bad on demurrer, and on very satisfactory grounds. An account stated cannot possibly be described as coming under the head of "necessaries;" and the question whether the items of which the account was made up consisted of necessities is, by the statement of the account, excluded from the view of the Court by such a replication, although that may be the truth. The Court held the replication bad most properly. The same observation applies to the case of *Bartlett v. Emery*, referred to by *Buller, J.*, and mentioned in the note to *Trueman v. Hurst*. In neither of those cases was the present point raised whether an "account stated" would be void as against an infant in that sense which would render it impossible to set it up as a ratification after he came of age. The cases, therefore, referred to, do not bear out the proposition of the defendant, and we have already stated, that we do not think it rests on any sound principle of law. The general doctrine is, that a party may, after he attains his age of twenty-one, ratify, and so make himself liable on contracts made during infancy; and we think, on principle, unopposed by authority, this may be done on a contract arising on an account stated as well as any other contract. Whether this replication amounts in fact to a new assignment is a matter which is not in question, because it is not pointed out as a ground of special demurrer, or that it is improperly pleaded as a replication.

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Judgment for Plaintiff.

SPENCE v. ROGERS.

TRESPASS for breaking and entering the plaintiff's dwelling-house, garden, and premises, and making a great
 of the plaintiff's bankruptcy is bad on general demurrer.

To an action
 of trespass,
 quare clausum
 fregit, a plea



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Manning, Serjt., (with whom was *Atkinson*.) That case was decided before the 6 Geo. 4, c. 16, s. 44, which vests in the assignees all rights possessed by the bankrupt, *Michell v. Hughes* (a). Under the old law, even a right to bring a real action passed to the assignees of a bankrupt, *Smith v. Coffin* (b). If the assignees are entitled to the land, à fortiori, they may sue in respect of an injury done to it. [*Parke*, B.—This declaration includes grievances in respect of which the assignees could not recover damage. *Rolfe*, B.—Suppose there has been serious personal inconvenience to the bankrupt, how can the assignees recover in respect of that? *Alderson*, B.—There was a case in which a party recovered 500*l.* for a trespass to his close (c); that amount was given in consequence of a personal insult accompanying the trespass: do you contend that such a right would pass?] No personal injury is alleged as the gist of this action; the substantial grievance is the breaking and entering; the inconvenience which the plaintiff sustained is merely matter of aggravation. If the declaration had been framed differently, that objection might have been taken, but as it is, the point does not arise. It clearly appears, that some damage is done to the land, and in respect of that, the assignees ought to sue. [*Parke*, B.—How does it appear that the assignees have made their election?] That is not necessary, the fiat vests in them the right to sue. In an action on a bill of exchange, a plea of the plaintiff's bankruptcy does not contain an averment that the assignees have elected to sue. *Wright v. Fairfield*, (d) is an authority in favour of this plea. [*Parke*, B.—That was the case of a wrongful act which diminished the bankrupt's estate, and prevented a profit from coming to the plaintiff. But to support this plea, you must make out that the assignees could maintain an action in respect of an injury done to the land of a bankrupt ten years before

(a) 6 Bing. 689; S. C. 4 M. & P. 577.

(b) 2 H. Bl. 444.

(c) *Merest v. Harvey*, 1 Marsh. 139; S. C. 5 Taunt. 442.

(d) 2 B. & Ad. 727.

1. *Journal of the American Medical Association*, 2000; 283: 2689-2695.

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THOMAS v. The Mayor of SWANSEA (a).

THIS was an action on an attorney's bill. Before plea, the defendant obtained an order to tax the bill, and paid into Court the amount found due on taxation. The plaintiff took the money out of Court, and on taxation of costs, the Master allowed the costs of taxing the bill, as costs in the cause.

Where, after action brought on an attorney's bill, the defendant taxes the bill, and pays the amount found due into Court, the costs of taxation are costs in the cause.

Crompton moved for a rule to shew cause why the Master should not review his taxation, by disallowing the costs of taxing the bill. The point had never been expressly decided, but the case which most resembled it, was *Harbin v. Miles* (b), in which it was held, that when an order for referring a bill to taxation is obtained after action brought, the defendant is not entitled to the costs of taxation, although more than one-sixth has been taken off.

ALDERSON, B., (sitting alone.)—I see no ground for a rule in this case. In my opinion the Master has come to a right conclusion; he is placed in the situation of a jury, to ascertain what is due, and whatever his verdict may be, the costs of ascertaining its amount must, on principle, be costs in the cause.

Rule refused.

(a) *Ante*, p. 470.

(b) 9 B. & C. 755.

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LAWRENCE PHILLIPS, SAMUEL PHILLIPS, and J. E.
LARRIEN v. CLAGGETT.

A Court of law will not interfere to prevent a party from pleading a release, unless it be made out manifestly and clearly that there has been a fraud by some person upon the plaintiff, and that the defendant is a party to that fraud.

Therefore, in an action for illegally pledging tobacco, the Court refused to set aside a plea of release by one of several parties interested in the tobacco, it not being clear that a Court of equity would, under the circumstances set aside the release.

Scinde, that a Court of law has no power to set aside a release, but can only prevent its being pleaded.

THIS was a rule, calling on the defendant to shew why a plea of release should not be struck out of the to plead several matters, and the said rule amended accordingly.

The following facts were disclosed by the affidavit. Prior to the year 1836, two thousand nine hundred forty hogsheads of tobacco had been purchased in the United States on a joint adventure of the plaintiffs, and two per of the names of Rogers and Gray, for the purpose of t sent to France. The contract with the French govern having failed, an arrangement was made, whereby R and Gray became possessed of eight hundred and s eight hogsheads, and the remaining two thousand seventy-two were sent for sale to a tobacco merchar London, of the name of Warwick, who was to make vances thereon. In the course of the year 1836, War was also in possession of other large quantities of tot purchased by Rogers and Gray, on the joint adventu themselves and the plaintiffs, Lawrence and Samuel Phi and for the purpose of which Lawrence had made advances. In August, 1836, the defendant, who had re from business many years before, was applied to by War to become a co-partner with him in the business of bacco merchant, the latter representing himself to man of considerable property, and stating to the defen that he required no capital with him, but was desiro having his assistance in the sale department. The fendant went into Warwick's counting-house in Septer 1836, and some time after agreed to join him in par ship from the 1st of October, 1836, upon an agree that he, the defendant, should not be entitled to sh any part, or be liable to any loss in respect of any tot then in the possession or under the control of War

and that he should have no interest whatever in any commission or profit to be derived from the sale of any portion of the said two thousand and seventy-two hogsheads of tobacco. In the latter part of November, 1836, negotiations took place between Lawrence and Samuel Phillips, (on behalf of themselves and the plaintiff Larrien,) and Claggett, (on behalf of Rogers and Gray,) with the view of ascertaining the exact share and proportion of the plaintiffs, and of Rogers and Gray, in the two thousand and seventy-two hogsheads, and the result was, an agreement in the beginning of December, 1836, that Rogers and Gray should retain possession of the eight hundred and sixty-eight hogsheads, and be interested in two hundred and thirty-four hogsheads, parcel of the two thousand and seventy-two hogsheads, but no actual division took place. In February, 1837, the plaintiff discovered that in the autumn of 1836, dock warrants had been taken out and pledged for the whole two thousand and seventy-two hogsheads of tobacco, and shortly afterwards Warwick and Claggett stopped payment, solely on account of Warwick's liabilities previously to the partnership. In May, 1837, a fiat in bankruptcy was issued, and in the following September the defendant obtained his certificate. Several actions were brought against the parties with whom the tobacco had been pledged, in which the defendant, at the request of L. and S. Phillips, was mainly instrumental in effecting advantageous compromises; and in July, 1839, the defendant had several interviews with Rogers, who stated to him, that he was advised that his, the defendant's certificate, would not discharge him from liability in respect of the illegal pledging of the tobacco, and proposed to give him a release against all claims in respect thereof, which was accordingly executed by Rogers without any express authority from the plaintiffs. At the time of its execution, and subsequently, L. Phillips had been in communication with the defendant, and had had several interviews with him respecting the said actions, but it did not appear that the

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defendant had ever mentioned to Phillips the existence of the release. In January, 1842, the plaintiff Larrien Rogers at Paris for the purpose of arranging accounts, it was then agreed between them, that Rogers and () should give up to the plaintiffs all their interest in the two hundred and thirty-four hogsheads, and should co in any proceeding against the defendant, for the rec of the surplus value of the said tobacco, but no me was made by Rogers to Larrien of the release to the fendant. The defendant's affidavit denied fraud, and s that the present action, which was for illegally pledging tobacco, was commenced in 1842, without any pre intimation to the defendant, or any idea on his part, c intention to proceed against him.

Kelly and *Sir John Bayley* shewed cause. The cases in which a Court of law will set aside a plea of release, where there is fraud, or the releasor has parted with his interest in the subject matter of the suit. In the present case it does not appear that there was any collusion between the defendant and Rogers, or that the release was given under circumstances which amounted to a fraud upon the plaintiffs. Until the action was commenced, the defendant was not aware that proceedings would be taken against him. Besides, as no division of the tobacco took place, Rogers clearly had a joint interest in the two thousand seventy-two hogsheads, and it was competent for him to grant a release. *Payne v. Rogers* (a), *Legh v. Legh* (b), *Hickey v. Burt* (c), *Mountstephen v. Brooke* (d), *Innes v. Newman* (e), *Manning v. Cox* (f), *Barker v. Richardson* (g) and *Johnson v. Holdsworth* (h), are cases in which Courts have refused to allow a plea of release, but they

(a) 1 Doug. 407.

(b) 1 B. & P. 447.

(c) 7 Taunt. 48.

(d) 1 Chit. Rep. 390; 3 B. &

Ald. 141.

(e) 4 B. & Ald. 419.

(f) 7 Moore, 617.

(g) 1 Y. & Jer. 362.

(h) *Aute*, vol. 4, p. 63, O. 1

proceeded on the ground, either that there was manifest fraud, or that the release was an attempt to defeat the right of the real plaintiff, by collusion with a nominal party who had no interest in the subject matter of the suit. But there are several authorities to shew that in the absence of fraud or collusion, the Court will not interfere. In *Arton and Dowson v. Booth* (a), the plaintiffs were in partnership from 1814 to 1816, when the partnership was dissolved, and by the terms of the partnership deed, Arton was to receive and pay all debts due to and from the partnership, and Dowson, the other partner, was not to interfere. Previously to the dissolution, the defendant was indebted to both the plaintiffs in 8*l*., for work done by them, and was afterwards informed by Arton that he alone was entitled to receive the money according to the terms of the partnership. Subsequently the defendant was applied to by Arton to pay the money, and on refusal an action was brought in the names of Arton and Dowson, to which the defendant pleaded a release from Dowson. The Court refused to set aside the plea, and *Dallas, C. J.*, said, "It is quite clear, that one plaintiff may release a cause of action brought by two, and therefore the Courts have laid it down as a leading principle, that a release may be set aside if there be fraud between the parties, but that the party applying must make out a very strong case of fraud. In *Herbert v. Piggott* (b), the action was brought by two out of four executors, and the two who were not joined in the action released the defendant at their suggestion, who pleaded the release puis darrein continuance; the Court refused to set aside the release; and *Bayley, J.*, said, "the executors who have given the release ought to have been co-plaintiffs, and I think it must be taken as if they were, and then the case of *Jones v. Herbert* (c) decides, that a plaintiff who applies to set aside a release given by a co-plaintiff, puis darrein continuance, must make out a very strong case of fraud.

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(a) 4 Moore, 192.

S. C. 2 Cr. & M. 384.

(b) *Ante*, vol. 2, p. 392, O. S.;

(c) 7 Taunt. 421.

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An action may be oppressive, as well as a release fraudulent." In *Crook v. Stephen* (a), the Court of Common Pleas refused, on a summary application, to set aside a release given to a defendant by one of two co-plaintiffs, where fraud between the releasor and the defendant, was established. *Wild v. Williams* (b) is also an authority to the same effect.

The *Solicitor General*, *Crompton* and *Waddington* in support of the rule. The releasor in this case has no interest in the damages sought to be recovered. The plaintiffs are tenants in common, and it is clear, from the authorities, that they are only entitled to recover damages in proportion to the amount of their interest, *Addison v. Overend* (c), *Worth v. Overend* (d). [*Parke*, B.—There was no fraud of the tobacco, and consequently Rogers and Gray continue interested in three-eighths]. Then the question is, whether it can be set up as an answer to the plaintiff's action? In *Leph v. Leph*, *Buller*, J., says, "There are many cases in which the Court has set aside a release given to prejudice the real plaintiff. All the cases depend on circumstances. If the release be fraudulent the Court will attend to the application." In *Herbert v. Leph*, *Bayley*, J., says, "A release may be most unjust, and if the Court sees that it is so they will interfere." In *Bailey v. Richardson*, *Hullock*, B., says "The Courts have exercised the jurisdiction sought to be enforced in this case on several occasions since the case of *Payne v. Rogers*. It is clear that if two partners commence an action on a release the subject matter of it, and that if there be no fraud to induce the Court to interfere and set aside that release it will be binding upon the other plaintiff and operate as a bar to the action. *Buller*, J., in the case of *Leph*

(a) 5 Bing. N. C. 688; S. C.
7 Scott, 848.
(b) 6 M. & W. 490.

(c) 6 T. R. 766.
(d) 7 T. R. 279.

Legh says, that there are many cases in which the Court has set aside releases given to prejudice the real plaintiff; and in all cases where the release so given is fraudulent, the Court is bound to interfere. Now in this case *Barker*, who is the real plaintiff by the terms of the dissolution, was to collect the debts due to and satisfy the claims upon the partnership; and the other plaintiff, *Owen*, had by the agreement relinquished all interest in the debt of which the defendant was fully aware fraud cannot be inferred, but must be clearly shewn by the affidavit of the party seeking to set aside the plea; that was the principle upon which the cases of *Arton and Dowson v. Booth* and *Furnival v. Weston (a)*, and the other cases cited for the defendant proceeded. But in this case no one can doubt that the defendant was privy to the fraud. He knew of the dissolution of the partnership, and the terms upon which it was dissolved, and when the payment of this debt was demanded, made no claim of set-off, but subsequently, with a full knowledge of the facts, took a release from *Owen*. The whole case is so pregnant with fraud, that we should not do justice between the parties, were we not to interfere and set aside the plea in this stage of the proceedings." In the present case, several circumstances combine to establish fraud. Though the defendant was in constant communication with *S. Phillips* at the time the release was executed, yet no mention was made of it. In like manner, the fact of its execution was concealed from the plaintiff *Larrein* in 1842. This is not an application to set the release aside, which perhaps the Court could have no power to do, but only to prevent its being used to the prejudice of the plaintiffs in this action. No injustice can result from striking out these pleas, and it is submitted that the facts fully warrant the Court in doing so.

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LORD ABINGER, C. B.—It has been the practice of Courts

(a) 7 Moore, 356.

law in many of the cases which the Courts have prevented a plaintiff from bringing, or any other matter of this kind, they have seen clearly and distinctly, and they would declare the release to be void, if they could see their way clear to do so. (They would, they would remedy,) set the release aside, in the necessity of having recourse to the law, sometimes an expensive litigation, whether the release has been given in good faith, or in collusion, or with the plaintiff having no interest whatever in the action, or under other circumstances, the ruling principle of the Courts in all cases is, that it is the duty of the Court of equity to do nothing but what is right. Now in this case the plaintiff has an immediate interest in the matter, and in the action, or any other action of this kind, brought. There had been no fraud, and no injury to his interest, and to give him only a nominal sum of the tobacco, and therefore this is a case which is not to be found in any of the cases of the same nature in any of the cases which come to the opinion that we are now considering, or any other matter which

mind that a Court of equity would set it aside. There are a great many facts and circumstances which we have no opportunity of collecting together, and it might be essential, in order to determine that point, that the precise state of accounts between Rogers and others of the co-partners in this transaction, and the precise extent to which Claggett had assisted Rogers and the plaintiffs in recovering from other persons the sums which it seems they have recovered in other actions arising out of this transaction should be seen; and various other causes combine to create serious doubts whether a release, under the circumstances, was not reasonable. Moreover, I cannot but observe, that this action is brought at a period when the Statute of Limitations was almost exhausted, so that it seems the parties have slept on their rights as to the action so many years, that they themselves give a sort of judgment that they thought Mr. Claggett, at least, ought to be spared. Taking all the circumstances together, I think it is by no means so clear, that a Court of equity would set aside this release unconditionally, and without terms, so as to justify a Court of law exercising its jurisdiction by making this rule absolute. After having given great attention to the very able argument of the *Solicitor General*, I cannot bring my mind to that degree of certainty as to how a Court of equity would act or ought to act, as to induce me to make this rule absolute. The circumstance of Mr. Rogers' conduct afterwards in 1842, undoubtedly may be an argument, but it is an argument that may work both ways. If he had given a release several years before, he may have changed his mind afterwards, and may have acted in concert with the parties. It is a circumstance which requires to be explained, but I cannot impute to the defendant a fraud in receiving this release, because Rogers a few years afterwards concurred with the other parties in endeavouring to recover the money. Under all the circumstances, I think we ought not to press our jurisdiction in order to set this plea aside, and therefore, the rule must be discharged.

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 and Others
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of law, but invalid in equity
defendant is answerable.
cases which have been cited
in dictum by setting aside the
cases, they have done more
than set aside the release itself. The
Court per incuriam, for I cannot
say the Court has, in the case of
this, to another, to set aside the
release to allow it to be pleaded.
On a point of law, upon one of the
points, not interfere, for that is the
point, they can only interfere where
and when a Court of equity
interferes, not merely as between the
defendant but as against the plaintiff.
The Court to exercise its equity
power made out manifestly and
clearly, fraud by some person upon
the demand, and that the demand
is valid. Unless that circumstance can
be shown clearly, this Court ought not
to set aside this release. This is a case in which a Court
ought not to set aside the release which
was set aside in Claggett in 1839. I am by

has expressly or impliedly bargained and disposed of that right to his other partners. Many cases have been cited, particularly *Barker v. Richardson*, where the plaintiff has agreed with others that they are to be substantially interested in a debt; that is his bargain, and he has no right to rescind it, and where the defendant is a party to the fraud, and receives the release, knowing that the person who gives the release is in that situation, the Court will set it aside. That is not the present case, because it does not appear on the affidavits here, that there has been any bargain by which Rogers has parted with the right which he would have independent of any rights of his own, to receive or release the proceeds of the subject matter in which they were jointly interested. It appears, that there was a negotiation in the course of the year 1836, in which it was contemplated that there should be an end of the partnership; that negotiation was certainly not carried into effect. After that negotiation took place, it appears clear, that Rogers continued to be interested either to the extent of the original three-eighths, or at all events, to the extent of that proportion, after deducting the eight hundred and sixty-eight hogsheads of tobacco, which were received by Rogers abroad. To some extent he had an undivided interest, and by virtue of that undivided interest, he had as much right to receive the proceeds or damages for misapplication of the tobacco, as the other persons had, and I cannot find anything in these affidavits to shew, that he himself, as a co-partner, had parted with that original right which he had; I do not think this is a case in which we should interfere. Perhaps it may not be correct to say, (and in that I agree with the *Solicitor General*,) that, in all cases in which a party has an interest, he may release; that is not perhaps correct. It is correct to say, that if he has parted with all interest, in that case, he cannot release. One of the cases cited by the *Solicitor General*, was a case where the partner agreed with his co-partner that that partner should receive all the debts due to the co-partner.

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ship, and to pay the debts of the co-partnership ; therefore he had disposed of his right to release the debts, although he had an interest in the ultimate surplus. I quite agree that where a person, under these circumstances, goes and executes a release with a party cognizant of the situation in which he stands, that is a case in which a Court of equity would interfere ; and it is a case, in which this Court, in the exercise of its equitable jurisdiction, would interfere to prevent the defendant pleading the release. It appears to me, in the present case, that it is extremely doubtful, whether there has been any fraud committed at all by Rogers or his co-partner, and certainly not fraud to which the defendant was a party. Therefore, I think this is not a case in which the Court ought to interfere. The judgment of a Court of law is final and conclusive, because there is no power of appealing from it. In all these cases, the Court, therefore, properly confine themselves to simple, clear, and manifest cases, about which there cannot be the slightest doubt that equity would relieve. At present, it is sufficient to say, it does not appear to me that this is such a case.

ALDERSON, B.—I agree that this rule ought to be discharged. The Court only interferes in a plain case, where

the act done in releasing the debt is clearly contrary to the

of an advantage to himself. There is nothing here to shew that he is cognizant of the fact. On the other ground the case appears to me perfectly plain: the party has an interest in the transaction and a right to have the money just as much as the plaintiffs, and consequently he had a right innocently of releasing. In all cases where one partner releases the debt due to himself, that would do to a certain extent injustice towards the other partner; he injures him, because the other partner would have the benefit of the debt if it were recovered. This is no more than that case. On these grounds it appears to me, that this release ought to stand, and that the plea ought to be allowed.

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 PHILLIPS
 and Others
 v.
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GURNEY, B., concurred.

Rule discharged with costs.

NASH v. BREESE.

ASSUMPSIT. The declaration stated that by a certain agreement made between the plaintiff and the defendant, it was agreed that the plaintiff should sell, and the defendant buy a certain messuage, farm, and lands for the sum of 5*s.*, and it was further agreed, that the defendant, on or before the 29th of September, 1842, should pay for the tenant's fixtures, manure, &c., which should be left by the plaintiff on the 29th of September, such sum as should be determined upon by a valuation, in case it should be made on or before the 29th of September, but if not so made, then

A declaration stated an agreement that the plaintiff should sell, and the defendant buy a messuage, &c., and before the 29th of September, pay for the fixtures, a sum determined by valuation, if made before the 29th of September, if not so made,

a reasonable sum. Averment, that no valuation was made: Breach, the non-payment of the reasonable sum. The plea set out the actual contract, by which it was agreed that the plaintiff "on receiving the reasonable value of the fixtures would execute an assignment of a lease of the messuage, and upon the execution of such assignment and payment as aforesaid, the defendant should be put in possession of the premises." The plea then alleged, "that the plaintiff did not, nor was he ready and willing to execute the assignment or put the defendant in possession of the premises, fixtures, &c.:" Held, that the plea was bad, as amounting to the general issue.

Semble, that the declaration would have been bad on special demurrer, for want of an averment that the plaintiff was ready and willing to execute the assignment, and put the defendant in possession.

made on the 27th of Jun
the defendant, by which
defendant to buy all the
same were comprised in
29th of April, 1842, for
years; (the plea then se
chase of the fixtures, &c.
proceeded,) that it was fi
receiving the sum of 5s.
fair and reasonable val
"should and would exe
said indenture of lease, fo
years, subject as aforesaid
"that upon the executio
and payment made as a
put in possession of all t
chattels, &c." Avermen
was ready and willing to
indenture to the defenda
and willing to put the def
mises, fixtures, goods, cha

Special demurrer, assi
neither confessed nor av
declaration, nor traversed
and that it amounted to tl

reasonable sum for the fixtures and manure; the plea sets out the real contract, and alleges as a defence, that the plaintiff would not execute an assignment, or give the defendant possession of the premises or fixtures. The plea does not confess and avoid the matter alleged in the declaration, but shews a contract different from that declared upon. The agreement in the declaration is an agreement without a condition, the answer set up by the plea is, that the contract was subject to a condition, which the plaintiff has not performed. In *Whittaker v. Mason* (a), *Tindal, C. J.*, says, "But we think this plea, which seeks to introduce a new condition into the special promise stated in the declaration, does not admit that promise, and excuse the non-performance of it, but does in effect deny that such promise was ever made." *Brind v. Dale* (b) was an action against a carrier for the value of goods given to him, to be carried and safely delivered, and which were lost by his negligence. The defendant pleaded that it was agreed that the plaintiff should himself watch and protect the goods from being lost, but that he neglected so to do. The plea was held bad on special demurrer, on the ground that as it qualified the contract it amounted to the general issue. In *Gardner v. Alexander* (c), which was an action for goods bargained and sold, the defendant was not allowed to plead that the goods were sold under a written contract, which the plaintiff had not complied with, as evidence of such a contract might be given under the general issue. *Jones v. Nanny* (d), *Grounsell v. Lamb* (e), and *Kemble v. Mills* (f), are authorities to the same effect. *Edmunds v. Harris* (g) has been overruled by subsequent decisions.

1843.

NASH

v.

BRESE.

- (a) *Ante*, vol. 6, p. 429, O. S.; S. C. 1 M. & W. 333.
 S. C. 2 Bing. N. C. 359. (e) 1 M. & W. 352.
 (b) 2 M. & W. 775. (f) *Ante*, vol. 9, p. 446, O. S.;
 (c) *Ante*, vol. 3, p. 146, O. S.; S. C. 1 Man. & Gr. 757.
 S. C. 1 Scott, 281. (g) 2 Ad. & E. 414; S. C. 4
 (d) *Ante*, vol. 5, p. 90, O. S.; Nev. & M. 182.

ceed against the merits, f
without producing the ag
to prove the execution of
session of the premises an

PARKE, B.—The effect
true contract, the assignn
of the money were to be
then qualifies the contra
contract to pay upon requ
thing not implied from
It is therefore bad, as am
the same time, the plaint
will not amend his decl
always been ready and w
execute an assignment of

ALDERSON and ROLFE,

PEARSON

A cause, in
which issues
were joined on
pleas of non-
assumpsit, payment, and set-off, was referred, toget

THIS was an action of
pleaded: first, non assu

assumpsit, payment, and set-off, was referred, toget

thirdly, set-off. After issue joined, the cause and all matters in difference were referred by Judge's order, which directed that the costs of the cause should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator. The arbitrator awarded, "that the plaintiff do pay to the defendant on the 14th of September next, the sum of 16*l.* 10*s.* 2*d.* being the balance which I find to be due from the said plaintiff to the said defendant." He further awarded, that each of the parties should bear his own costs of the reference, and a moiety of those of the award. A rule nisi for an attachment having been granted for the non-payment of the sum awarded and costs.

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PEARSON
v.
ARCHBOLD.

Crompton shewed cause. The award is bad, inasmuch as it does not dispose of the cause, neither is there a distinct finding upon each issue. The costs of the cause abide the event, but upon this award it is impossible to say which party is to pay them. The plaintiff may have succeeded upon one or two, or upon neither of the issues. *Bourke v. Lloyd* (a) is precisely in point; there, the costs of the cause were to abide the event of the award, and the arbitrator awarded that the plaintiff had good cause of action against the defendant, and that the defendant should pay 20*l.* to the plaintiff, together with the costs of the action; but there was no specific award upon each issue, and it was held that the award was bad, on the ground that where a cause, in which there are several issues, is referred to an arbitrator, and the costs of the cause are to abide the event of the award, the arbitrator must find specifically upon each issue, otherwise the master cannot tax the costs. The Court then called upon

Sir John Bayley, in support of the rule, who cited *Cooper v. Langdon* (b).

(a) *Ante*, p. 452; S. C. 10 M. & W. 550. *Ante*, p. 836; S. C. 9 M. & W. 60; 10 M. & W. 785.

(b) *Ante*, vol. 1, p. 392, N. S.;

PARKE, B.—I am of the
to say upon the award wha
tiff and what for the defe
may have awarded the 16
fendant on account of his s
the plaintiff's claim, and t
upon the other issues. C
in favour of this award.
whether the issues found
sistent, and the Court h
record.

ALDERSON and GURNEY

CLOWES and Others v. B
and W

An act of Par-
liament re-
quired a com-
pany to enrol
in Chancery, a memorial of the names, residences
also enacted, that the expenses of obtaining that
company. in preference to all other payments. O

WILLES moved that
tionem pudendum issue aq

Ryton, as members of the Patent Rolling and Compressing Iron Company, at the time the contract with the plaintiffs was entered into. The action was brought for printing done by the plaintiffs, and judgment had been obtained against the secretary. By the 20th section of the 4 & 5 Wm. 4, c. lxxxix, (intituled "An Act to enable 'the Patent Rolling and Compressing Iron Company,' to purchase letters patent, and to sue and be sued,") it was enacted, "that the company should cause to be enrolled in the High Court of Chancery, a memorial of the names, residences, and descriptions of the shareholders of the company." The 32nd section enacted, "that all costs and expenses attending the applying for, obtaining, and passing this act, should be paid out of the funds of the company, in preference to all other payments whatsoever." An affidavit was made by a person who had searched the memorial of the shareholders enrolled in Chancery, and it was sworn, that such memorial contained the names of "John Batty, Carrier, Wolverhampton," and also the name of William Ryton, and that William Batty was, by mistake, called and inserted in the said memorial as John Batty. The present debt was one of the expenses attending the obtaining of the act of Parliament. Notice had been given to the defendants, that the Court would be moved that execution do issue against them.

1843.
CLOWES
and Others
v.
BRETTELL.

T. Wilde shewed cause, in the first instance, on behalf of Batty, and produced an affidavit "that there was no such person as William Batty, who was a shareholder in the said company, or had any transactions or dealings whatever with the said company." He also urged that as the present debt was incurred in obtaining the act of Parliament, the plaintiff was bound to resort to the funds of the company, before he took proceedings against the individual members of it.

Whitmore shewed cause on behalf of Ryton. The notice

1843.

*Clowes
and Others
v.
Brettell.*

given was that the Court would be moved that execution be issued: such notice is insufficient. [*Alderson, B.* notice follows the express words of the act of Parliament which permits execution to issue against the individual shareholders "after notice of motion to the persons to be charged."] If notice of motion for a scire facias had been given, the defendant Ryton would not have appeared. [*Parker, B.*—The only consequence is, that he was not entitled to the costs of appearing, unless he shewed grounds upon the merits.] The defendant alleges that he was not a shareholder at the time the contract was entered into. [*Alderson, B.*—We cannot try that question upon affidavit. A scire facias has already issued against another shareholder (a), and it never could have been the intention of the Legislature, that numerous concurrent writs should issue. At all events, the plaintiffs ought to shew that their demand has not been satisfied by the previous execution.

Willes, in support of the rule. The defendant's affidavit only states, that a rule has been obtained for a scire facias against another shareholder, but there is no statement that the scire facias issued, while, on the other hand, the plaintiff's affidavit states that the defendants "are now indebted and that the debt "remains due and owing."

Parker, B.—The rule must be absolute. If it be alleged that Batty is not a shareholder be true, that may be pleaded in answer to the scire facias. There is nothing in the act of Parliament to prevent the plaintiffs from proceeding to execution for this debt against the share of the company. The section referred to, which directs that the expenses of obtaining the act are to be paid out of the funds of the company, is merely a direction to the company that they shall discharge such debts first.

(a) See *Clowes v. Brettell*, ante, p. 528.

who is a creditor for expenses incurred in obtaining the act, ought not to be in a worse situation, because the company have violated their duty in not paying him before the other creditors.

1843.

CLOWES
and Others
v.
BRETELL.

ALDERSON, B.—The memorial describes as a shareholder, one John Batty, a carrier, living at Wolverhampton. If the defendant Batty be not that person, it would be easy for him to state that he is not a carrier, and does not live at that place; but in the absence of any such affidavit, we must give credit to the plaintiffs' affidavit, that William and John Batty are one and the same person, and that such person was, at the present time, a shareholder. With respect to the statement of Ryton, that he is not now a shareholder, it is to be observed, that his name appears among the list of shareholders in the act of Parliament, and though he may since have parted with his interest, he will still be liable, unless he has caused the name of the transferee to be inserted in the memorial.

ROLFE, B., concurred.

Rule absolute.

—◆—

COOMBE v. GREENE.

COVENANT. The declaration stated, that by an indenture made, &c., the plaintiff had demised certain premises to the defendant, subject to a covenant, that the defendant should expend 100*l.* in substantial improvements of and additions to the dwelling-house, and in the substantial and permanent repairs thereof, under the direction and with the approbation of some competent surveyor, to be named by

A declaration stated that the plaintiff demised certain premises to the defendant subject to a covenant that the defendant should expend 100*l.*, in substantial improvements,

additions and repairs, under the direction and with the approbation of some competent surveyor to be named by the plaintiff: Breach, that defendant would not expend the sum of 100*l.*, in substantial improvements, &c., although the plaintiff was always ready and willing to appoint a competent surveyor.

Held, bad on special demurrer.

point a competent surveyor to make improvements of and add to the same.

Special demurrer, as alleged in the breach the competent or any surveyor on probation the defendant to pay a sum of 100*l.* in improvement according to the said condition.

Bovill, in support of the plaintiff, does not disclose any breach by the defendant. The condition requires the defendant to expend a certain sum in the improvement of the dwelling-house, under the probation of a surveyor appointed by the plaintiff, and the plaintiff is bound to appoint a surveyor to expend the money. The plaintiff was ready and willing to do so, and the declaration ought to stand.

Ogle, contra. A statute says that if a plaintiff would be entitled to recover if he had not appointed a surveyor, that the defendant had not done any part of the dwelling-house, and in the event of rebuilding it, and in the event of the plaintiff would be liable to an action.

PARKE, B.—The plaintiff has declared upon a covenant by which the defendant undertakes to do certain repairs, under the direction and with the approbation of a surveyor, to be named by and on the part of the plaintiff. The appointment of a surveyor is a preliminary step, and until that is taken, the defendant cannot fulfil his part of the contract. He cannot begin the work until a surveyor is appointed to direct and approve of his proceedings. The appointment is a condition precedent to his liability to expend the 100%; consequently, the breach is bad, and there must be

1843.

COOMBE
v.
GREENE.

Judgment for Defendant.

DOWLING v. POWELL.

IN this case a rule had been obtained, calling on the plaintiff to shew cause why all proceedings should not be stayed, on the ground that the action was brought to recover a sum less than 40s. The affidavit in support of the application stated that the amount indorsed upon the writ was 1*l.* 5*s.*, and that the defendant had been served with a copy thereof “in the county of Monmouth, where he and the plaintiff were then residing,” and within the jurisdiction of a county Court, to which the defendant was liable to be summoned.

An affidavit in support of an application to stay proceedings on the ground that the action was brought for a sum under 40*s.* stated that the defendant was served with the writ in the county of M., where he and the plaintiff were then residing.

Smythies shewed cause, and objected that the affidavit was insufficient; it merely stated that the defendant was residing in Monmouthshire at the time of the service of the writ; he might not have been resident there at the commencement of the action, or even at the time of making the present application. The ordinary form of affidavit for a rule to enter a suggestion for costs, is, that the plaintiff and defendant “before and at the time of the commence-

Held, insufficient, for not shewing that the defendant was resident there at the time of the commencement of the action.

if it appear to the Court 40s., they will, on motion v. *Williams* (c) is distinguished refused to set aside the debt was not required of the plaintiffs to shew that the county Court.

LORD ABINGER, C. J. sufficient, and the rule

PARKE, B.—I am of opinion ought to have shewn that and liable to be summoned at the time of the commencement is a fact lying within his knowledge. The plaintiff could not state with

ALDERSON and ROLF

(a) *Chitty's Form*, p. 6

(b) 4 T. R. 495.

1843.

NEEDHAM v. LAW.

THE defendant was sued as the registered public officer of a banking copartnership, under the provisions of the 7 Geo. 4, c. 46, s. 9. A Judge at Chambers had allowed pleas of fraud, payment, and set-off, but had refused to allow a plea denying that the defendant was public officer at the time of the commencement of the suit.

The Court will not allow a party sued as public officer of a banking co-partnership to plead a plea denying that he was public officer at the commencement of the suit, together with other pleas which go to the merits.

Peacock moved for leave to add the latter plea, and to amend the rule to plead several matters accordingly. The allegation in the declaration, that the defendant was summoned as the public officer of the copartnership, necessarily implied that he was such public officer at the time of the commencement of the suit. He had, however, ceased to be connected with the company long before the commencement of the action.

PER CURIAM (a).—We have already held, that we will not allow the bankruptcy of a public officer to be pleaded (b), and we ought not to permit this plea together with others which go to the merits. If the defendant chooses to rest his case upon the fact that he was not the public officer at the time of the commencement of the suit, and strike out the other pleas, he may do so.

Rule refused.

(a) *PARKE, ALDERSON, and ROLFE, B's.*

(b) *Steward v. Dunn, ante, p. 742.*

count stated, the defendant, being under terms of pleading issuable, pleaded a set-off of 1,500L., for a total loss on a policy of assurance for freight. The plaintiff having signed judgment on the ground that the plea was non-issuable, the Court set aside the judgment without costs.

Quare, whether unliquidated losses on a policy of assurance can be made the subject of a set-off.

pleading issuable, pleads that the company in the defendant's policy of assurance was thereby lost or not lost, a certain ship called the assurance was thereby de the plea then averred a was ready and willing, set-off and allow to the of action, &c. The plaintiff pleads the ground that the plea has been obtained to set aside

Rawlinson shewed that unliquidated damages, a set-off. The statute of set-off between the plaintiff and the defendant's liability in respect of the damages together vague and uncertain cannot be considered a statute. In *Howlet v. S* to an action of covenant damages by reason of the loss of the defendant, in the value of the damages the plaintiff demurred specially

ant's damages could not be set-off, and Lord *Mansfield*, C. J., says, "The act of Parliament, and the reason of the thing relate to mutual debts only. These damages are no debts; an indebitatus assumpsit could not be brought for them." And *Ashurst*, J., says, "Debts to be set-off must be such as an indebitatus assumpsit will lie for." The cases on this subject are collected in *Morley v. Inglis* (a), where it was held, that the defendant could not set-off a sum of money due to him from the plaintiff on a guaranty; and *Tindal*, C. J., in delivering judgment, says, that "the rule by which we are to determine whether or not a demand can become the subject of set-off, is by inquiring whether it sounds in damages; whether the demand is capable of being liquidated or ascertained with precision at the time of pleading." In *Cope v. Joseph* (b), where the question was, whether a party who had guaranteed goods to the extent of a sum certain, could be held to bail, the Court, in reference to actions on policies of insurance, say, "In such actions, undoubtedly, the demand is for unliquidated damages." *Grant v. The Royal Exchange Assurance Company* (c), is the converse of the present case; there the plaintiff declared in covenant for a total loss on a policy of assurance effected in his own name, and averred the interest in one count to be in himself, and in another, in himself and others; the defendants pleaded that a less sum was due on the policy, than for a total loss, and offered to set-off monies due to them on the plaintiff's bond, which was made to them before they had notice that any other than the plaintiff was interested in the policy, and the pleas were held bad. Though, in that case, another question arose as to the claims being mutual, yet the Court were clearly of opinion, that the plaintiff's demand being for unliquidated damages, a set-off could not be pleaded. The decisions in cases of bankruptcy do not bear upon this question, for the statutes relating to bankrupts apply to mutual credits as well as debts. Secondly,

1843.

THOMSON,
Public Officer,
&c.
v.
REDMAN.

(a) *Ante*, vol. 6, p. 202, O. S.;
S. C. 4 Brev. N. C. 58.

(b) 9 Price, 155.

(c) 5 M. & Sel. 439.

issuable plea? There is
on an insurance of freight
of *indebitatus assumpsit*
the one case, the jury
and in the other the value
a policy of assurance is
s. 4, which enables the
debt upon it. Many cases
lie, may be made the subject
is not in point, for the
arose upon a guaranty
sidered a debt. *Grant*
Company was decided
embraced several interests
the claim upon it, and the

LORD ABINGER, C. B.
but as there is some doubt
be to raise the question
absolute for setting aside

PARKER, B.—In *Cum*
seems to have been of
underwriter against the assured

(a) *Ante*, vol. 8, p. 768, O
S. C. 6 M. & W. 622.

not set off unliquidated losses happening upon policies. It is to be observed, however, that the point was not determined, as the case was decided upon other grounds. In *Koster v. Eason* (a), it was held, that in an action against insurance brokers for premiums by the assignees of one of the underwriters who had become bankrupt, the defendants might set off losses and returns due on policies effected in the name of their own firm, but not such as were effected in the names of their principals, such losses and returns having become due on those policies, before the time when the bankrupt stopped payment, though they had not been adjusted by the bankrupt, but only by the underwriters, between the term of his stopping payment, and committing the act of bankruptcy, on which adjustment the defendants had given their principals credit for the amount. *De Gaminde v. Pigou* (b) affords a semblance of authority in support of the position contended for on the part of the defendant.

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 THOMSON,
 Public Officer,
 &c.
 v.
 REDMAN.

ALDERSON, B.—I agree that the rule ought to be made absolute, though I have some difficulty in seeing how the defendant's claim, which is altogether uncertain, can be made the subject of a set-off.

ROLFE, B., concurred.

Rule absolute.

(a) 2 M. & Sel. 112.

(b) 4 Taunt. 246.

NICHOLLS v. WILSON.

THIS was an action to recover 10*l.* 12*s.* 7*d.*, for work and labour done by the plaintiff, as the attorney of the defendant, in a cause of *Wilson v. Smith*.

At the trial, before the under-sheriff of Warwickshire,

As a general rule, an attorney cannot abandon a suit before its termination, and without giving his client rea-

sonable notice, though particular circumstances may justify him in so doing.

Therefore, where an attorney did not proceed with a suit, it was held, that he could not recover for the work actually done, he not having proved a notice, or shewn why he abandoned the cause.

The under-sheriff told the plaintiff was not justified in action, without giving him time to get him with money to carry on the action. The jury having recovered. The jury having found against the plaintiff,

Montagu Chambers moved for a new trial on the ground of misdirection, and of the jury being misled by the sheriff. An attorney is not to be allowed to continue on a case to its termination on insufficient grounds, and, in the event of recovery for the work done, to be allowed to recover costs. In *Browne (a)*. In *Wadsworth* it was held that if an attorney has recommended an action, and because he afterwards disapproved of it, he is not to be allowed to discontinue the action. [Lord . . .] notice to his client that he had disapproved of it. It was never suggested that there was any negligence, or had impliedly given notice therefore, reasonable notice. There was no question for the jury to decide where, in an action against

was held to be a question for the jury, whether a notice by an attorney to his client on the Saturday before the commission day (Thursday), that unless supplied with funds he would not deliver briefs, was or was not reasonable notice.

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LORD ABINGER, C. B.—I do not lay it down as a rule that an attorney, who abandons a suit before its termination, cannot in any case recover his costs without having given his client due notice, because it is possible to conceive circumstances under which an attorney might be justified in proceeding no further with the suit. That, however, is not the case here, and there seems to be no ground whatever for granting a rule.

PARKE, B.—I am of the same opinion. The rule is correctly laid down in *Harris v. Osbourn* (a), where Lord Lyndhurst, said, “I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination. I do not mean to say, that under no circumstances can he put an end to this contract, but it cannot be put an end to without notice.” There might certainly be cases in which he would be at liberty to do so without notice, for a case might occur so plain as not to require notice. But in the present case, it does not appear upon what ground the suit was abandoned, and it was for the plaintiff to shew satisfactorily why he has not proceeded with it.

ALDERSON and GURNEY, B.’s, concurred.

Rule refused.

(a) 2 C. & M. 632.

1843.

DAVIDSON v. CARR.

In an action on an attested agreement, it was proved that the attesting witness, some months ago, had embarked on board a vessel bound for America, that a letter had been since received in his handwriting, and marked by him "ship letter," and that he had not been seen at a lodge of Odd Fellows, to which he belonged; *Held*, sufficient to let in secondary evidence.

THIS was an action on a written agreement, to which the defendant pleaded the general issue. At the trial, before *Coltman, J.*, at the last Liverpool assizes, it appeared that the agreement was attested by a witness, who was stated to be out of the country. In order to let in secondary evidence, a person was called, who stated, that about eleven months ago he saw the attesting witness embark at Liverpool, on board a vessel bound for America; that he had some months after received a letter, in the handwriting of the attesting witness, and marked by him, "ship letter;" and that he had not since seen him at a lodge of Odd Fellows to which they both belonged. On cross-examination, he stated that the attesting witness formerly lived at Salford, but that he (the witness) had not made inquiries about him there, nor was he acquainted with any of his relations. The learned Judge thought this sufficient to let in secondary evidence, and the plaintiff obtained a verdict, leave being reserved to the defendant to move to enter a nonsuit.

Beames moved accordingly. The presence of an attesting witness can only be dispensed with upon the clearest

1843.

SMITH v. COX.

ASSUMPSIT by indorsee against drawer of a bill of exchange. The declaration stated, that whereas the defendant, on the 28th day of August, A.D. 1842, made his bill of exchange in writing, and directed the same to one William Smith, junior, and thereby required the said W. Smith to pay to the order of the defendant 20*l*., three months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then delivered the said bill to the said W. S., and the said W. S. then accepted the said bill, and the defendant then indorsed the same to one Adcock, who then indorsed the same to the plaintiff; and the said W. S. did not pay the said bill, although the same was duly presented to him on the day on which it became due, of which the defendant had due notice.

In assumpsit by indorsee against drawer of a bill of exchange, the omission of a promise to pay is ground of special demurrer.

Special demurrer, assigning for cause, that the declaration did not contain any promise by the defendant to pay the said bill of exchange, or the sum of money in that count mentioned.

Whitehurst, in support of the demurrer, was stopped by the Court.

Hugh Hill, contra. An express promise need not be stated, as the law will imply a promise to pay from the facts alleged. The point was before the Court in *Griffith v. Roxburgh* (a), and though it was not there determined, yet the Court seemed of opinion, that since the new rules have rendered the plea of non assumpsit inadmissible in actions on bills of exchange, it is unnecessary to allege a promise which cannot be denied. It might be otherwise

(a) *Ante*, vol. 6, p. 133, O. S.

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in an action at the suit of an executor, for in that case the promise may be put in issue. *Timmis v. Platt*(a). In *Mountford v. Horton*(b), the first count of the declaration, which was in assumpsit, stated an agreement between two persons, omitting mutual promises; and on motion in arrest of judgment, it was held, that the agreement imported a promise.

PER CURIAM(c).—The objection ought to prevail. Unless a promise be alleged in declarations on bills of exchange, there will be nothing to distinguish the action of assumpsit from that of debt, and for aught that would appear to the contrary, there might be a misjoinder of counts on the record. It was not the object of the new rules to abolish the distinction in the forms of the two actions. The plaintiff may have liberty to amend, otherwise there will be judgment for defendant.

Amendment accordingly.

(a) 2 M. & W. 720.

(b) 2 New Rep. 62.

(c) Lord ABINGER, C. B.,

PARKE, ALDERSON, and GURNEY, B's.

plaintiff not having proceeded to the trial of the issues in fact,

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 QUARRINGTON
 v.
 ARTHUR.

E. V. Williams had obtained a rule nisi for judgment as in case of a nonsuit, against which

Petersdorff shewed cause, upon affidavit, that since the issues were joined the plaintiff had become a bankrupt; and he offered a *stet processus*.

E. V. Williams. The *stet processus* should be confined to the issues in fact, as the defendant is already entitled to the costs of the demurrer.

PARKE, B.—No doubt it ought to be so, but there is a difficulty in point of form in entering a *stet processus* to part of a record. The better course would be for the plaintiff to enter a *nolle prosequi* to so much of the declaration as applies to the issues in fact; the defendant consenting that the plaintiff shall not be liable to costs upon such *nolle prosequi*.

The suggestion of the Court was acceded to.

THE ATTORNEY GENERAL v. ROGERS.

THIS was an information by the *Attorney General* against the defendant, a tobacconist, for mixing saccharine matter with tobacco, in the course of manufacture, and for having the prohibited article in his possession, contrary to the provisions of the 5 & 6 Vict. c. 93. The cause was tried at the Middlesex Sittings after Hilary Term, before Lord

Though the verdict in a penal action has been found for the defendant, the Court has the power to grant a new trial, if they are satisfied that such ver-

dict is in contravention of the law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on the part of the jury to take the exposition of the law into their own hands.

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Abinger, C. B., and a special jury, and a verdict for the defendant.

The *Attorney General* had obtained a rule nisi to set aside the verdict, and for a new trial, on the ground that the jury had found a verdict contrary to law, and in opposition to the direction of the learned Judge.

Erle and *Thomas* shewed cause. Where a verdict has been found for the defendant in a penal action, the Court will not grant a new trial, unless there has been misconduct by the Judge, or misconduct on the part of the jury. See *Wilson v. Rastall* (a), *Calcraft v. Gibbs* (b). The principle in this respect has been established, by reason of the distinction which exists between a penal action and a criminal action. In *Mattison, qui tam v. Allanson* (c), which was a criminal action, the jury found a verdict for the defendant, contrary to the evidence, yet the Court refused a new trial, there being no proof of any misbehaviour by the defendant, or of tampering with the jury; the reporter adds, "And within the reason of cases in the Exchequer, where verdicts for defendants are never set aside for penalties in the duties." In *Ranston v. Etteridge* (d), the jury having found a verdict for the defendant, contrary to the direction of the Judge, and founded on a mistake, the Court refused a new trial, there having been no misconduct in the jury. In *Rex v. Wandswoorth* (e), where the defendant had been acquitted on an indictment for the non-repair of a road, the Court refused a new trial, although the verdict was contrary to the weight of evidence, and Lord *Ellenborough* C. J., there says, "My objection to making this rule absolute is, that the Court will thereby be doing indirectly that which if they did directly, would be contrary

(a) 4 T. R. 753.

(b) 5 T. R. 19.

(c) 2 Stra. 1238.

(d) 2 Chit. 273.

(e) 1 B. & Ald. 63.

established practice of the Court, acted upon in a variety of cases; that is, they will, in effect, be granting a new trial in a criminal case, where the defendant has been acquitted." *Rex v. Sutton* (a) is an authority to the same effect. [*Parke, B.*—I sat in the Court of Queen's Bench when that case was decided, and we set aside the verdict, not on the ground of any misdirection in point of law, but because the Judge had made a strong observation to the jury, on the facts calculated to mislead them, the verdict being in accordance with that observation, and a very erroneous one.]

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The *Attorney General, Jervis, and Wilde*, contra. *Gregory v. Tuffs* (b) is an express authority in point. That was an action on the 25 Geo. 2, c. 36, for keeping an unlicensed room for music and dancing. A verdict having been found for the defendant, a new trial was moved for, on the ground that the verdict was contrary to the direction of the Judge in point of law, and against the law. Lord *Lyndhurst, C. B.*, said, "It is not usual where a verdict has been found for a defendant in a penal action, to grant a new trial on account of the verdict being against the evidence; but whenever there has been a misdirection in point of law, by the Judge who presided, it is a matter of course, that a new trial should be granted, because the jury have been misled by the Judge in point of law. If, however, the jury are misled, in point of law, by any other means, there seems to be no reason why their mistake, in point of law, should not be rectified. In the present case, we are satisfied that the jury have acted on a misapprehension of the law." The rule was accordingly made absolute for a new trial.

LORD ABINGER, C. B.—As to the power of the Court to grant a new trial in this case or in any other of a similar nature, my opinion is, that whenever the Court are satisfied

(a) 5 B. & Ad. 52; S. C. 2 N. & M. 57.

(b) *Ante*, vol. 2, p. 711, O. S.; S. C. 1 C., M. & R. 310.

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that the verdict of the jury is in contravention of the law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on the part of the jury to take the exposition of the law into their own hands, it would be very mischievous to say that the Court has no power to grant a new trial, however fit they might think the case for the discretion of a jury. If the objection of the defendant's counsel is to prevail, there would be no use in having established rules of law, because the jury might set them at defiance whenever they pleased, and very probably they frequently would, were it once laid down that the Court could not question their verdict. The course of criminal judicature has been relied on, but there is this difference, that there the law has provided no means for granting a new trial or reversing the verdict, the constitution of the country having, in criminal cases, vested in juries, full power to find as they think fit. And in civil cases, it is the same where the question is a mixed question of law and fact. In such cases, the administration of justice requires that the whole case should be submitted to the jury, and the Court will not, in these cases, grant a new trial, merely because they think the jury may have been mistaken in the law. Where, however, the question turns on admitted facts, if we were to hold that we could not reverse a verdict

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HEATH v. NESBITT.

IN this case a rule had been obtained, calling on the plaintiff to shew cause why two orders of *Gurney*, B., one directing the defendant's arrest under the 1 & 2 Vict. c. 110, s. 3, and the other refusing his discharge, should not be rescinded, and the defendant discharged out of custody. The rule had been obtained upon fresh affidavits, and those used before the learned Judge, in support of the application for the defendant's discharge, were not brought before the Court.

Though on an application to the Court after the refusal of a Judge to discharge a defendant under the 1 & 2 Vict. c. 110, either party may produce fresh affidavits, yet those used before the Judge must be brought before Court.

Watson shewed cause, and contended that as the present application was in the nature of an appeal from the decision of the Judge, the affidavits used before him should be brought before the Court, in order that they might see whether or no the Judge's discretion had been properly exercised.

PER CURIAM (a).—Although additional affidavits may be used on an application of this kind, as we lately decided (*b*), still we ought to have before us those upon which the learned Judge refused to discharge the defendant. Unless we are acquainted with the facts before him, it is impossible for us to determine whether he has decided correctly or not.

The Court being about to enlarge and amend the rule,

Watson waived the objection, and shewed cause upon the merits, and the rule was ultimately discharged.

(a) Lord ABINGER, C. B., PARKE, GURNEY, and ROLFE, B.s.

(b) *Gibbons v. Spalding*, ante, p. 746.

1843.

To scire facias against the shareholders of a company on a judgment obtained against the secretary, the defendants pleaded, that no memorial of the names, residences, and descriptions of the directors and secretary of the company was enrolled as required by act of Parliament: *Held*, bad.

BRADLEY and Others v. URQUHART and Others

DECLARATION in scire facias against certain n of "The Patent Rolling and Compressing Iron Co on a judgment recovered against the secretary company.

Plea. That no memorial of the names, residen descriptions of the directors and secretary of the sa pany has ever been duly enrolled in the High C Chancery according to the form of the statute in s made and provided.

Special demurrer, assigning for cause, that the a scire facias being merely to enable the parties sued cause why the plaintiffs should not have execution them, the defendants are estopped from pleadi matter in this action which might have been ple the original action.

Martin, in support of the demurrer. The plea that the judgment has been rightly obtained, and states, in answer, that which is no cause against the of the execution, though it might, perhaps, have aff defence to the original action. It is a well establish that to a scire facias the defendant cannot ple matter which would have been an answer to the action. The Court then called upon

Kelly to support the plea. The 4 & 5 Vict. c. s. 22, enacts, "that within six months after the pa this act, the company shall cause to be enrolled in th Court of Chancery a memorial, verified as her mentioned, of the names, residences, and descrip the directors and secretary, for the time being, of th pany and of the shareholders thereof, and when a director or secretary shall be appointed, the compan within three months from the happening of such a

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and Others
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cause to be in like manner enrolled, a memorial of the name, residence, and description, and of every such new director or secretary, specifying in whose places they shall respectively have been appointed, and when any persons shall cease to be shareholders of the company, or when any other persons shall be admitted shareholders of the company, the company shall, within three months from the happening of such an event, cause to be enrolled in like manner, a memorial of the name, residence, and description of every person so ceasing to be a shareholder of the company, and of every person so admitted to be a member thereof." The twenty-first section enacts, "that all or any of the particulars aforesaid, may be contained in the same memorial." And the twenty-second section provides, that the several memorials shall be in the form or to the effect expressed in the schedule annexed to the act, and shall be signed by the secretary or one of the directors of the company, and shall be verified by a declaration of such secretary or director before a Master of the High Court of Chancery, made pursuant to the provisions of the 5 & 6 Wm. 4, c. 62. The Legislature has been thus strict in requiring a memorial, in order to afford protection to the shareholders. It was evidently intended that the company should not be sued, except through the secretary or directors, but if the requisite memorial be not enrolled, actions may be brought and judgments obtained against paupers, and the shareholders of the company made responsible on those judgments. The mode of proceeding against the company being the creature of the act of Parliament, its provisions should be strictly complied with.

PARKER, B.—I entertain no doubt in this case. The plea is clearly bad as containing matter which might have been pleaded to the original action. Though the particular mode of obtaining execution against the shareholders of the company is given by the act of Parliament, yet the proceeding does not differ from the ordinary *scire facias*, to

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BRADLEY and Others v. URQUHART and Others.

To scire facias against the shareholders of a company on a judgment obtained against the secretary, the defendants pleaded, that no memorial of the names, residences, and descriptions of the directors and secretary of the company was enrolled as required by act of Parliament:
Held, bad.

DECLARATION in scire facias against certain members of "The Patent Rolling and Compressing Iron Company" on a judgment recovered against the secretary of the company.

Plea. That no memorial of the names, residences, descriptions of the directors and secretary of the said company has ever been duly enrolled in the High Court of Chancery according to the form of the statute in such matter made and provided.

Special demurrer, assigning for cause, that the action in scire facias being merely to enable the parties sued to have execution of the judgment, and not to inquire into the cause why the plaintiffs should not have execution of the judgment, the defendants are estopped from pleading matter in this action which might have been pleaded in the original action.

Martin, in support of the demurrer. The plea states, in answer, that which is no cause against the execution of the judgment, though it might, perhaps, have afforded defence to the original action. It is a well established principle that to a scire facias the defendant cannot plead matter which would have been an answer to the original action. The Court then called upon

Kelly to support the plea. The 4 & 5 Vict. c. lxv. s. 22, enacts, "that within six months after the passing of this act, the company shall cause to be enrolled in the Court of Chancery a memorial, verified as herein mentioned, of the names, residences, and descriptions of the directors and secretary, for the time being, of the company and of the shareholders thereof, and when any director or secretary shall be appointed, the company shall, within three months from the happening of such an event,

cause to be in like manner enrolled, a memorial of the name, residence, and description, and of every such new director or secretary, specifying in whose places they shall respectively have been appointed, and when any persons shall cease to be shareholders of the company, or when any other persons shall be admitted shareholders of the company, the company shall, within three months from the happening of such an event, cause to be enrolled in like manner, a memorial of the name, residence, and description of every person so ceasing to be a shareholder of the company, and of every person so admitted to be a member thereof." The twenty-first section enacts, "that all or any of the particulars aforesaid, may be contained in the same memorial." And the twenty-second section provides, that the several memorials shall be in the form or to the effect expressed in the schedule annexed to the act, and shall be signed by the secretary or one of the directors of the company, and shall be verified by a declaration of such secretary or director before a Master of the High Court of Chancery, made pursuant to the provisions of the 5 & 6 Wm. 4, c. 62. The Legislature has been thus strict in requiring a memorial, in order to afford protection to the shareholders. It was evidently intended that the company should not be sued, except through the secretary or directors, but if the requisite memorial be not enrolled, actions may be brought and judgments obtained against paupers, and the shareholders of the company made responsible on those judgments. The mode of proceeding against the company being the creature of the act of Parliament, its provisions should be strictly complied with.

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and Others.

which a defendant can only plead matters which do not impeach the judgment. I do not, however, say that a scire facias of this description cannot, under any circumstances, be impeached; no doubt it may on the ground of fraud, but in that case, the proper course might, perhaps, be to apply to the Court to set aside the writ. But here it is sufficient to say that there is a good judgment against the company, and upon these pleadings the defendants admit that they are shareholders. It was competent for the defendants to deny that they are members of the company, for such defence is not inconsistent with the judgment, but if they intended to rely on their present defence, they should have resorted to it in the first instance. It would be contrary to all principle to permit the matter to be again litigated in this form.

ALDERSON, GURNEY, and ROLFE, B.s, concurred.

Judgment for the Plaintiffs (a).

(a) See *Bradley v. Warber*, *post*, p. 1059.

JONES v. ROBINSON.



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JONES

v.

ROBINSON.

discharged out of custody on such terms as the Court or a Judge may direct. The sheriff is placed in a situation of great difficulty. He would not be justified in relinquishing the custody of the defendant, and if he retains it, he must necessarily incur considerable cost. Unless the Court are disposed to afford him relief, it would be less expensive for him to discharge the debt out of his own pocket. In *Baker v. Davenport* (a), it was held a bad return to state that the defendant, upon being arrested in his own house, was confined to his bed by illness, and could not be removed without danger to his life, and so continued ill at and after the return of the writ, and for such cause the custody of the defendant was relinquished. Under the circumstances, the plaintiff ought either to accept security for the debt, or pay the extra costs incurred by reason of the inability of the sheriff to remove the defendant.

LORD ABINGER, C. B.—We can only assist you by enlarging the time for the sheriff's return until next Term. We have no power to compel the plaintiff to accede to any terms which might be proposed, and if security were given, there is nothing to prevent the defendant, if he recovered, from going abroad.

Rule accordingly.

(a) 8 D. & R. 606.

TODD v. EMLY and Others.

ASSUMPSIT for goods sold and delivered. The cause had been tried several times, and issue was at length joined

The Middlesex county Court, Act, (23 Geo. 2, c. 33,) does

not apply to cases in which the cause of action arose within the city and liberty of Westminster. The common law jurisdiction of the Middlesex county Court is not taken away by the 23 Geo. 2, c. 33.

Quare, whether the 19th section of the 23 Geo. 2, c. 33, (which deprives the plaintiff of costs, where he recovers less than 40s. in the Superior Courts,) applies to a verdict on a plea collateral to the merits of the action, as a plea, *puis darrein continuance* of the non-joinder of a co-contractor.

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on a plea, puis darrein continuance of the release of a joint contractor (a), and a verdict found for the plaintiff, for 1*l*. A rule was afterwards obtained, and made absolute, to redress the verdict to 1*s*.

Thesiger had obtained a rule, calling on the plaintiff to shew cause why a suggestion should not be entered on the roll, under the Middlesex County Court Act, (23 Geo. c. 33, s. 19,) to deprive the plaintiff of costs, on the ground that the amount of damage recovered, was less than 4*l*. and that the defendants, at the time of the commencement of the suit, were residing within the county of Middlesex and liable to be summoned to the county Court there. Affidavits were produced on the part of the plaintiff stating that the cause of action arose within the city and liberty of Westminster.

Petersdorff shewed cause. The defendant seeks to deprive the plaintiff of costs, under the 19th section of the Geo. 2, c. 33, which enacts, "that in case any action of trespass or of assumpsit shall be commenced or prosecuted after said 24th day of June, in any of his Majesty's Courts of record, at Westminster, and the defendant or defendants at the time of such action brought, shall live or reside in the county of Middlesex, and be liable to be summoned to said county Court, and the jury upon the trial of such cause shall find for the plaintiff under the value of forty shillings unless the Judge shall, in open Court, certify on the face of the record, that the freehold or title to the plaintiff's land principally came in question, or that an act of bankruptcy principally came in question at such trial; then in such case, no costs shall be awarded to the plaintiff in such action, but the defendant or defendants shall be entitled to and recover double costs of suit." The act is intituled "an act for preventing delays and expenses in the trial

(a) See the case, *Ante*, p. 571, and vol. 1, p. 598, N. S.; S. C. 1 & W. 606.

ceedings in the county Court of Middlesex, and for the more easy and speedy recovery of small debts in the said county Court ;” and the preamble states, “ whereas sheriffs, in their several county Courts hold plea of all personal actions, where the debt or damages do not amount to 40*s.* : and whereas the proceedings in the county Courts in such actions, have been found to be vexatious, expensive, and dilatory, for remedy thereof in the county of Middlesex, and for the more easy and speedy recovery of small debts within the said county, be it enacted, &c., that from and after the 21st day of June, 1750, it shall and may be lawful to and for the suitors of the county Court of Middlesex, together with the county clerk of the said county in county Court assembled, or the major part of them, the said county clerk and suitors so assembled upon any plaint to be entered in the said county Court, in any suit where the debt or damages shall not amount to the sum of forty shillings, to proceed in a summary way, and from time to time to make such order or decree, orders or decrees, as shall seem to them, or the major part of them so assembled, to be just and agreeable to equity and good conscience,” &c. The 4th section, after enacting that no plaint entered in the county Court shall be removed, provides, “ that no person or persons shall be liable to be summoned to the said county Court, at the suit of any plaintiff or plaintiffs, other than such person or persons, as was or were liable to be summoned to the county Court of Middlesex, before this act was made, and that this act shall not extend to give the said county Court any jurisdiction to hold plea of, or to hear or determine any action, cause, or suit, other than such action, cause, or suit, as the county Court of Middlesex might have held plea of by plaint, before the making of this act.” The 21st section provides, “ that nothing in the act contained, shall extend or be construed to extend to the city and liberty of Westminster, and the precincts of the same, and so much of the several parishes of Saint Clement’s

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v.
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and Others.

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Middlesex county Court exist
all the liberties and franchis

they were specially exempted by statute or charter, and that in the same session of Parliament, as the 23 Geo. 2, c. 33, another act was passed, (23 Geo. 2, c. 27,) establishing a Court of Requests for the city and liberty of Westminster. By the 6th section of the latter act, it is enacted, that "it shall and may be lawful to and for every resident and inhabitant within the said city and liberty, or the said part of the said Duchy aforesaid, and to and for all and every person and persons, residing or keeping any shop, shed, stall, or stand, or seeking a livelihood within the said city and liberty of Westminster, or in the said part of the said Duchy aforesaid, who now have or hereafter shall have any debt or debts due or owing unto him, her, or them, not amounting to the sum of forty shillings, by any person or persons whatsoever, inhabiting or seeking a livelihood within the said city and liberty of Westminster, or within that part of the said Duchy aforesaid, to apply to the said clerks of the said Court, or one of them, who shall cause such debtor or debtors so inhabiting or seeking a livelihood as aforesaid, to be warned or summoned by the said high bailiff, or his officer or officers, (who are hereby appointed, authorized, and required to execute all warrants, precepts, and process of the said Court of Requests,) by writing left at the dwelling-house or place of abode, shop, shed, stall, stand, or any other place of dealing of such debtor or debtors, to appear before the commissioners of the said Court, to be held in and for such division, where such debtor or debtors shall inhabit or reside as aforesaid, and that the said commissioners, or any three or more of them, shall, after the return of such summons as aforesaid, have full power and authority, by virtue of this act, to make or cause to be made, such acts, order or orders, decrees, judgments, and proceedings, between such party or parties, plaintiffs, and his or her, or their debtor or debtors, defendants, touching such debts, not amounting to the sum of forty shillings, as they shall find to stand with equity and good conscience, &c." And the 21st section, enacts,

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"that no action or suit for any debt not amounting to sum of forty shillings, and recoverable by virtue of this in the said Court of Requests, shall be brought against person residing or inhabiting within the jurisdiction the in any other Court whatsoever." In *Scotts v. Seagar* (a) was held, that the privilege of not being sued in the co Court, did not extend to persons seeking their liveli in Westminster, but to inhabitants and residents only. a recent act of Parliament, (6 & 7 Wm. 4, c. cxxxvii,) jurisdiction of the Court has been raised to 5*l*., and enacted by the 86th section of that act, "that no action suit for any debt not exceeding the sum of forty shilli and recoverable by virtue of this act in the said Cou Requests, shall be brought against any person residin inhabiting within the jurisdiction thereof, in any other C whatsoever." When the Westminster Court of Reque was established, the Legislature did not exclude the j diction of the county Court of Middlesex, but allowed Court to have concurrent jurisdiction with the Westmir Court in all cases, except where the defendant was resi and inhabitant within the city and liberty of Westmin The 23 Geo. 2, c. 33, did not create a new Court wi the county of Middlesex, with the exception of cer districts, but merely regulated the proceedings in the cou Court which previously existed, consequently the effect the 21st section of that act, is only to exclude from jurisdiction, cases in which the parties are resident wi the city and liberty of Westminster. If it were otherw this consequence would follow, that where the defenc resided out of the city and liberty of Westminster, he wo be subject to the jurisdiction of the Middlesex Court established by the act, but where he resided within the and liberty of Westminster, the form of proceeding wo be under the old law. As to the other objection, the ctinction attempted to be drawn between collateral and ot

(a) 1 M. & Rob. 244.

issues, is altogether groundless, the sole question, in these cases, being for what amount, and in respect of what is the action brought. If the Court had a jurisdiction over the case in the first instance, that could not be nullified by a collateral issue arising at the trial. The case of *Welchen v. Le Pelletier* is merely a loose note.

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LORD ABINGER, C. B.—The rule must be discharged. With respect to the question raised, as to the collateral issue upon the plea, *puis darrein continuance*, I do not wish to pronounce any definite opinion. The case referred to, if any authority, certainly bears some analogy to the present, because, whatever the nature of the action brought, a plea in abatement for misnomer, is certainly a plea collateral to the real subject of the action. If that case be any authority, it will go a great way, for the same principle will apply here; but it is unnecessary to enter into that point. There is a class of cases not adverted to in argument, which certainly do not fall within these acts of Parliament, as, for instance, an action for money had and received, brought to try a right, in which the party recovers no more than a farthing. In such a case, the Court would not call upon the party to enter a suggestion on the record. I remember an important action in the Court of King's Bench, to try the right of coal-meters to receive certain fees, though the action itself was brought to recover the sum of two shillings, and also an action by a rector against the churchwardens. Wherever the action is brought to try a right, though the money recovered is less than forty shillings, the Court will not grant a rule to deprive the plaintiff of costs. But, in the present case, the 21st section, to which our attention has been called, affords a complete answer to this application. It has been argued, ingeniously I admit, that when the Legislature passed the 23 Geo. 2, c. 33, they intended to refer to another act just passed, for founding a Court of Requests in the city of Westminster. All that can be said is, that such is a probable conjecture, but that is not of sufficient

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weight to govern the interpretation of an act of Parliament. The defendant's counsel take an act of Parliament passed in the same session, with that under consideration, which possibly may have been meant to apply to and operate conjointly with it, for particular purposes, but which does not necessarily so operate, and then seek to fasten on the Legislature that they must have intended to operate in that way, and in that way only. That is a liberty which we have no right to take with the Legislature. If it was really meant, that the act should have the effect contended for by the defendant's counsel, it would have been easy to have inserted in the Middlesex act, a proviso that nothing in that act should extend to an act passed so and so. That would have been a clear exception of all cases included in the other act. Suppose the Middlesex act had run thus, "excepting such parts of the county as are within the city and liberty of Westminster," its effect would be the same as if the act had passed for every part of the county not provided for by the Westminster act. That is the case now, for we are bound to carry the proviso into every clause of the act of Parliament. The former clause, section 20, provides, that nothing therein contained shall extend, or be construed to extend to the Tower of London, or to the several parishes, liberties, precincts, hamlets, and places within the Tower Hamlets. Will it be contended, that this

ties. In giving this interpretation, we do not deny that this case was within the concurrent jurisdiction of the county Court at common law, but all we decide is, that this particular act of Parliament does not apply to this case, which is one expressly excepted from the act. My opinion is founded on the interpretation of the proviso in the 21st section.

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GURNEY, B.—I am of the same opinion.

ROLFE, B.—Mr. *Thesiger* wants us to read the proviso thus—"that this act shall not extend to parties within the jurisdiction of the Westminster act." It is a very likely case, than when the clause was introduced, something of that kind was meant. But, as my Lord has said, we cannot act upon such a supposition. The Legislature has said, that the provisions of the Middlesex act, shall not extend to the city and liberty of Westminster, which is just the same as if it had said, that the county Court related to all parts of the county of Middlesex, other than the city and liberty of Westminster.

Rule discharged.

EAGLETON v. GUTTERIDGE.

TRESPASS for forcibly breaking the outer door and entering the plaintiff's dwelling-house and expelling him therefrom, and seizing his goods. Plea, not guilty, by statute.

In trespass for breaking the outer door, and entering the plaintiff's dwelling-house, the defendant may give in evi-

dence under the general issue, that he had entered by virtue of a warrant of distress for rent, and was turned out of possession, whereupon he committed the trespass complained of.

A power was executed abroad, appointing one — B., attorney. The power was delivered to B., who inserted in the blank space, the Christian name "Henry:" *Held*, that the power was not invalidated thereby.

Agreement as follows, "I, W. E., do hereby acknowledge, that I am indebted to B., as agent of S. my landlord, in the sum of 22*l.*, for arrears of rent for the cottage now in my occupation; and I do now pay the said B. 5*l.*, on account and in part of such rent, and do hereby undertake to pay the said B. 8*l.* per annum, by quarterly payments": *Held*, not to require a lease stamp.

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At the trial, before Lord *Denman*, C. J., at the Hertford Spring Assizes, the plaintiff proved that the defendant had broken open the outer door of the dwelling-house, and committed the trespass alleged. The defendant in support of his case, put in the following agreement, dated the 9th of September, 1831, and signed by the plaintiff:—

“I, William Eagleton, do hereby acknowledge that I am indebted to Mr. T. W. Blagg, as agent of J. Sheppard, my landlord, in the sum of 22*l.* for arrears of rent, and do hereby undertake to pay to the said T. W. Blagg the sum of 5*l.* on account, and in part of such rent, and do hereby undertake to pay the said T. W. Blagg, the sum of 8*l.* per annum for the said cottage and premises by quarterly payments from Michaelmas last.”

This agreement was stamped with a one pound stamp. On the 27th of April, 1842, Sheppard, being then in America, executed a power of attorney, whereby he appointed ——— Bee, of Ware, his true and lawful attorney (amongst other things) to ask, sue, demand, or distrain for, recover, and receive of and from all and every person and persons whom it doth or shall concern, all monies, compensation, and damages as are and shall from time to time become due or payable, or which I am or shall be entitled to recover from the rents, issues, profits, use, and occupation of the said hereditaments and premises or otherwise in

The Christian name "Henry," was inserted in the power of attorney after its arrival in this country. From the evidence of Bee himself, it appeared that a person of the name of Mumford, who had lately arrived from America, called, by direction of Sheppard, on Bee, and after consulting with him respecting some houses belonging to Sheppard, left for London. Mumford came a second time, and, on that occasion, asked Bee if he would act as Sheppard's agent, and upon his consenting so to do, Mumford delivered to him with the power of attorney, which was addressed "Mr. Bee, auctioneer, Ware." Bee, or his son by his direction, inserted the Christian name "Henry" in the power of attorney, the former being satisfied that the power was intended for him, and there being no other auctioneer in Ware of the same name. It further appeared, that the trespass in question was committed by the defendant in the execution of a warrant of distress, issued by Bee, for the arrears of rent mentioned in the above agreement. The entry was, in the first instance, lawful, but the defendant having been forcibly ejected, he broke open the outer door of the house, and again took possession, which was the trespass complained of. On the part of the plaintiff, it was objected, first, that the agreement operated as a demise, and, that, consequently, the stamp was insufficient; secondly, that the power of attorney was vitiated by the insertion of the name of Henry; thirdly, that the forcible entry was not justifiable; fourthly, that the justification was not admissible under the general issue. The learned Judge overruled the objections, and told the jury, that if they were satisfied from the evidence that the defendant was forcibly turned out of possession, the subsequent re-entry was justifiable. The jury having found in the affirmative, a verdict was entered for the plaintiff, with 10*l.* 4*s.* 6*d.* damages, leave being reserved for the defendant to move to set the verdict aside.

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Thesiger having obtained a rule accordingly,

[...], and it is only an
cedent tenancy, and shews ar
to the objections made to the p
Judge at the trial expressed
sufficient evidence of the pow
Bee, and the jury appear to
point. With respect to the
having found that the defenda
possession, he was justified at
to recover it.

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there must have been a dem
was put in as such, there was
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[*Parke*, B.—It was evidently
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purpose]. That question shou
Lastly, the evidence of justifi
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case of an assault, the justification must be pleaded specially.

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PARKE, B.—In that case there is an admission of a trespass, which the particular circumstances justify; but here there is no confession of a trespass; the entry was justifiable at common law.

Rule discharged.

CHAMBERS v. SMITH.

IN this case, a writ of *distringas* to compel an appearance had issued, tested the 11th of April, and made returnable on the 26th.

Writs of *distringas* must be returnable not less than fifteen days after the teste, exclusive both of the day of teste and return.

Humfrey had obtained a rule nisi to set aside the *distringas* for irregularity, on the ground that there were not fifteen days between the teste and return of the writ.

* *Wordsworth* shewed cause, and referred to the rule of Court, E. T., 2 Wm. 4 (a), and the 11th section of the 2 Wm. 4, c. 39, by which it is required that every writ of *distringas* shall be made returnable on some day in Term, not being less than fifteen days after the teste thereof, and shall bear teste on the day of the issuing thereof, whether in Term or Vacation.

Humfrey having been heard in support of the rule, the Court directed the rule to be discharged.

On a subsequent day,

Humfrey again mentioned the case, and cited as an authority in point, *The Queen v. The Justices of Shropshire* (b), in which the Court of Queen's Bench had decided

(a) *Jervis's Rules*, 93.

(b) 8 Ad. & E. 173; S. C. 3 N. & P. 286.

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Parliament, we are bound
must put a reasonable consti
act. The intention of the
frame these writs in accorda
impression is, that original v
days, one exclusive and th
Prac. p. 107, it is said, "the
days at least, between the te
writ; the law requiring that
service and return." As th
ance, we will inquire what
writs.

PARKE, B., on a subsequ
gued as to the number of days
the teste and return of a writ
quires that the writ shall be
in Term "not being less th
thereof." A decision in the
been referred to, in which t
to mean clear days, and it
valid distinction between th
less." It is not necessary t
the present case and that in
the latter case does not invo

and upon inquiry, we find that such writs were returnable in fifteen days, exclusive both of the teste and return (*a*). Here the writ has been made returnable within fifteen days, one inclusive, and the other exclusive; the result is, that the rule must be absolute.

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Rule absolute.

(*a*) In Gilbert's Common Pleas, p. 10, it is said, "These writs have fifteen days between the teste and return, exclusive of them both, in order that there may be time for the sheriff to make up the summons, and that the party might come up, though it were in the remotest part of England."

BRADLEY v. WARBER.

DECLARATION in scire facias against a shareholder of the "Patent Rolling and Compressing Iron Company," on a judgment recovered against the secretary of the company.

Plea, that the writ of scire facias issued without leave first granted by the Court upon motion in open Court, contrary to the form of the statute in such case made and provided.

Demurrer and joinder.

The Court called upon

Peacock to support the plea. The question is, whether the subject-matter of the plea affords a substantial defence, or is a mere irregularity, for which application should have been made to the Court to set aside the writ. On referring to the provisions of the 4 & 5 Vict. c. lxxxix., it will appear that the plea is a substantial defence to the action. The 11th section of that statute, enacts, "that every judgment, decree, or order of any Court of justice in any proceeding against any such nominal party as aforesaid, may be lawfully executed against, and shall have the like effect on the estate, funds, and property of the company, and subject to

An act of Parliament incorporating a company, provided that every judgment against the nominal defendant, might be executed against the person and estate of every shareholder, provided, that no such execution should issue, without leave of the Court, and after notice of motion.

Held, that the issuing a scire facias without leave of the Court was a mere irregularity, and could not be pleaded in bar of the scire facias.

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the restrictions hereinafter enacted upon the person, estate, funds, and property of every shareholder thereof, as if every individual shareholder had been, by name, a party to such proceeding." The 12th section enacts, "that it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him, in any such action or suit against any such nominal party as aforesaid, to be issued against all or any of the shareholders for the time being of the company, and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby; then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into, upon which such action or suit shall have been instituted: Provided always, that no such execution against any person being or having ceased to be a shareholder, shall be issued without leave first granted by the Court in which such judgment, decree, or order shall have been obtained, upon motion in open Court, and after notice of such motion given to the person sought to be charged," &c. It seems but reasonable, that the judgment creditor should endeavour to make the funds of the company available for the purposes of the debt, before he proceeds against the individual shareholders. The Legislature has, therefore, required that leave should be granted by the Court before the execution

Court to set aside the writ for irregularity? Look at the form of a scire facias, it states the recovery of a judgment, and calls on the party to shew cause why execution should not issue. This plea admits the judgment, and only states as an answer, matter preliminary to the issuing of the writ. We ought to make the scire facias issued under the statutes conformable to the old course of proceeding.] This is not a mere irregularity in the practice, but it is an omission of something required to be done by act of Parliament. The distinction, in that respect, is pointed out by *Bayley, J.*, in delivering judgment in *Sandon v. Proctor* (a).

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PARKE, B.—The question turns upon the construction of the act of Parliament, which provides, “that no such execution against any person being or having ceased to be a shareholder, shall be issued, without leave first granted by the Court, in which such judgment, decree, or order shall have been obtained upon motion in open Court, and after notice of such motion given to the person sought to be charged.” Does that mean that the party shall be deprived of his execution, unless an application has been made to the Court before the scire facias issued, (for which we can find no precedent,) or does it mean that the omission is an irregularity, for which an application should be made to the Court to set aside the writ? We think it is a mere irregularity, and there must be judgment for the plaintiff.

ALDERSON, B., concurred.

Judgment for Plaintiff (b).

(a) 7 B. & C. 803.

ante, p. 1042; *Wingfield v. Bar-*

(b) See *Bradley v. Urquhart*,

ton, ante, p. 355.



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DUNN and Another v. HILL and Another.

To an action for goods sold and delivered, the defendant pleaded puis d'assignation, that on the 13th of July, 1843, the plaintiffs were bankrupt, and that afterwards an official assignee was appointed, and after the last pleading in the cause, and within eight days now last past, the creditors' assignees were chosen: *Held* bad, for not shewing that the official assignee was appointed within eight days before plea.

DEBT for goods sold and delivered. Plea (dated 10th of February, 1843), that the plaintiffs ought not further to maintain their action, because the plaintiffs, before and on the 11th of January, 1843, and from thence continuous until the issuing of the fiat in bankruptcy hereinafter mentioned, were corn factors and merchants, and dealers and chapmen, and exercised in co-partnership, the trade of corn factors within and subject to the statutes then in force concerning bankrupts. The plea then stated the petitioner creditor's debt, the issuing of a fiat in bankruptcy under the 5 & 6 Vict. c. 122, on the 12th of January, 1843, be prosecuted in the Court of Bankruptcy in the Leeds district, in the Court of York, by virtue of which fiat, M. West, Esq, one of the commissioners of the said Leeds district Court of Bankruptcy, on the 13th of January, 1843, the due forms of law, found that the plaintiffs had become and were bankrupts; and afterwards, &c., at the Court of Bankruptcy for the said district, then held at the Commercial Buildings at Leeds, appointed H. Hope, an official assignee, duly chosen and appointed according to the said statute, to be an assignee of the estate and effects of the bankrupts, together with the assignees chosen by the creditors of the bankrupts. The plea then set out the ordinary proceedings in bankruptcy, and proceeded thus:—And the defendants further say, that after the last pleading in this cause, to wit, after the 23rd day of December, 1843, on which day issue was joined in this cause, and notice of trial given, and before this day, and within eight days now last past, to wit, at a meeting duly held on the 2nd of February, 1843, in the Court of Bankruptcy, &c., the plaintiffs then remaining bankrupts, C. B. and J. W. were nominated and chosen by the major part in value of the creditors of the plaintiffs, who had, under the fiat, proved their debts to be 10*l.* and upwards, to be assignees of the estate and effects of the plaintiffs; and afterwards and after

the last pleading in this cause, to wit, on the said 23rd day of December, 1842, on which day issue was joined and notice of trial given, and before this day and within eight days last past, to wit, on the 2nd of February, 1842, M. B. Bere, Esq., then and still being one of the commissioners of the said Court of Bankruptcy for the said district, approved, ratified, and confirmed the said choice of and appointed the said C. B. and J. W. assignees of the said estate and effects. Accordingly, and afterwards, and after the last pleading in this cause, &c., the said C. B. accepted the said trust, by reason whereof and by the force of the statute, H. Hope and C. B., "then and after the said alleged causes of action accrued, and after the last pleading in this cause, on the said 23rd day of December, 1842, on which day issue was joined in this cause and notice of trial given, and before this day and within eight days now last past, to wit, on the 2nd day of February, 1843, became, and were and are assignees of the estate and effects of the plaintiffs as such bankrupts, and became and were entitled to the said alleged debts, sums of money, and causes of action in the declaration mentioned.

Special demurrer, assigning for cause, that the plea did not shew with sufficient certainty that the said H. Hope was appointed to be an assignee, as therein mentioned, after the last pleading next before the same plea, or after the 23rd of December, 1842, or after issue was joined in this cause, or after notice of trial given, or within eight days last past next before pleading the same plea, or that the matter of the said plea arose or accrued after the last pleadings next before the same plea.

Cowling, in support of the demurrer. The plea is bad for want of that certainty which is required in a pleading of this description, *Com. Dig.* tit. "*Abatement*," I. 24, 65. The plea shews, indeed, that the creditors' assignees were appointed within eight days before plea, but it does not state when the official assignee was appointed. His appoint-

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ment may have taken place before issue joined, and more than eight days before the pleading *puis darrein continuance*. The right of action passed from the plaintiff to the official assignee as soon as the latter was appointed. The 5 & 6 Vict. c. 122, under which the fiat in question was issued, contains in the latter part of the forty-eighth section this proviso, "that until assignees shall be chosen by the creditors of each bankrupt, such official assignee so appointed to act with the assignees to be chosen to act with the creditors, shall be enabled to act, and shall be deemed to be to all intents and purposes whatsoever the sole assignee of each bankrupt's estate and effects." There is a similar provision in the 1 & 2 Wm. 4, c. 56, s. 4. In *Montagu and Ayrton's Bankrupt Law* (a), it is said that "the official assignee acts as provisional assignee," "until the assignees are chosen, the official assignee to act to all intents and purposes, sole assignee." In *M v. Clark*, (b), *Bosanquet*, J., says, "the liabilities of the official assignee are the same as those of ordinary assignees."

Addison, contra. The plea is sufficient. The official assignee is chosen to act until the creditors' assignees are appointed, and the plea shews that within eight days before it was pleaded, the right of action vested in the plaintiff. Suppose the official assignee had died within eight days after his appointment, and within eight days before plea the other assignees had been appointed, would not the plea be good? Pleas *puis darrein continuance* are pleadable as of right, *Kinnear v. Tarrant* (c), and the rule of the Court of Hilary Term, 4 Wm. 4, r. 2, which compels parties to plead such pleas within eight days after the subject-matter arose, would be productive of great hardship if strictly construed, as in many cases it would be difficult within that time, to ascertain the precise state of facts.

(a) pp. 114, 226.

(c) 15 East, 622.

(b) 2 Bing. N. C. 309.

practice, the official assignee never sues alone, and the only object of his appointment seems to be to preserve the property of the bankrupt for the benefit of the creditors until the other assignees are appointed.

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LORD ABINGER, C. B.—The plea is bad, and the plaintiffs are entitled to our judgment. A plea *puis darrein continuance* ought to be certain, for the defendant in pleading it abandons all his other pleas, and rests his chance of success upon that alone. In the present case, the plea professes to shew that within eight days next before pleading it, the right of action was divested from the plaintiffs, and transferred to some other person. But it does not appear on the face of this plea when the transfer to the official assignee took place; at all events, it is not shewn that it took place within the eight days next preceding the date of the plea. It is clear that the 5 & 6 Vict. c. 122, s. 48, vests in the official assignee all the rights and interests of the other assignees until they are appointed. If, indeed, we look to the former part of the section only, there might be some doubt, for that part only says that the official assignee alone shall possess and receive all the estate and effects of the bankrupt (a), but the subsequent part clearly shews

(a) Section 48, And be it enacted, "That a number of persons, not exceeding thirty in the whole, being merchants, brokers, or accountants, or persons who are or have been engaged in trade in the United Kingdom, shall be chosen by the Lord Chancellor to act as official assignees in all bankruptcies prosecuted in the country, one of which said official assignees shall, in all cases, be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors, such official assignee to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner as the Lord Chancellor, or as the Court of Review, or Judge, or any commissioners of the Court of Bankruptcy, if authorized so to do by any order of the Lord Chancellor, shall from time to time direct; and all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estate and effects, real and personal of every bankrupt, shall, in every case, be possessed and received by the official as-

preceeding eight days, exp
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signee alone, save where it sh
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all monies, Exchequer bills, Inc
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forthwith transferred, deliver
and paid by such official assign
into the Bank of England, to t
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order, rule, and regulation f
the keeping of the account of t
said monies and other effects, a
for the payment and delivery
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ABATEMENT.

See **AFFIDAVIT**, 4.
COMPANY (PUBLIC), 1.
VARIANCE, 3.

A plea by an attorney, defendant to an action in the C. P., that he is an attorney of the Queen's Bench, and not of the Common Pleas, must be pleaded by attorney, and not in person. *Groom v. Wortham*, 657

ACCEPTOR.

See **PLEA**, 5.

ACCORD AND SATISFACTION.

See **GUARANTEE**.

ACCOUCHEUR.

See **PLEA**, 15.

ACCOUNT.

A defendant in an action of account, having suffered judgment by default, the Court granted a rule,

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calling on him to shew cause why he should not appear and consent to the appointment of auditors, or why a writ of *capias ad computandum* should not issue against him.

The 1 & 2 Vict. c. 110, does not affect the writ of *capias ad computandum*. *Pryor v. Pettingell*, 755

ACCOUNT STATED.

See **PARTICULARS**, 3.

To debt on an account stated the defendant pleaded infancy, to which the plaintiff replied a ratification by defendant, after he came of age: *Held*, that "debt," might be maintained.

Quare, as to whether the ratification should not have been pleaded by way of new assignment. *Williams v. Moor*, 998

ACCOUNTANT GENERAL.

See **CROWN (DEBTOR)**, 1.
SHERIFF, 6.

EJECTMENT, 4.

JURAT.

PROHIBITION.

1. An affidavit commencing thus, "O. S., of, &c., maketh and saith," the word "oath" being omitted, will not be received by the Court, even though it purports by the jurat to have been duly sworn. *Doe dem. Britton and Others v. Clark*, 393

2. Part of the jurat of an affidavit was written on one side of the paper, and below it the words "a commissioner for taking affidavits in this Court" were erased; the remainder of the jurat was written on the other side of the paper: *Held*, that the affidavit was not vitiated thereby. *Wills v. Dawson*, 465

3. An affidavit was entitled in the Exchequer, and the jurat stated it to be sworn before J. L., Master Extraordinary in the Court of Chancery: *Held*, bad.

Where there is a defect in the jurat of an affidavit, the Court will, in future, discharge the rule *with costs*. *Frost v. Hayward*, 566

4. An affidavit, entitled, "Between S. F., administratrix, &c., plaintiff, and W. L., defendant," is bad; and where an affidavit so entitled, was employed in verification of a plea in abatement, the Court set aside the plea, and only granted leave to the defendant to plead afresh, upon terms of his pleading issuably. *Fletcher, Administratrix v. Lechmere*, 848

errors in a writ of trial, the defendant by appearing at the trial, and defending the action, precludes himself from subsequently objecting to the writ. Therefore, where, in a writ, the day of the date of the teste was left in blank, and the writ was ordered to be returned "immediately," instead of on a day certain, as is required by the 3 & 4 Wm. 4, c. 42, s. 17, but the defendant appeared at the trial, and went to the jury without raising any objection, it was held, that as those errors were amendable, he could not, upon subsequent motion, set aside the writ on the ground of irregularities. *Masters v. Davy*, 340

2. A motion to set aside proceedings, on the ground of a mis-trial, must be made within the first four days of the next Term.

A venire facias bore teste 4th of June, 1842, and was returnable immediately. The distringas juratores, bore teste 2nd of November, 1842, and commanded the sheriff to distrain the jurors, so that he might have their bodies before the Barons at Westminster, on the 17th of June, unless the Chief Baron should first come on the 15th of June. The cause was tried on the 25th of June, and a verdict found for the plaintiff: A writ of error, coram vobis, was afterwards sued out: *Held*, that the error was a misprision of the clerk, and might be amended on motion. *Cheese v. Scales*, 438

3. If a postea is amended, a party is not bound to draw up and serve the order "forthwith," if his opponent can take no fresh step; and, therefore, such an order *drawn up* on the 23rd, pursuant to an order *made* on the 22nd, was held to be served in sufficient time on the afternoon of the 24th, all those days being in Term.

There is no appeal to the Court above to contest a Judge's discretion,

as to the amendment of a postea, because there is no power to compel a production of his notes of the trial. *Lord Abinger, C. B. Sandford v. Alcock*, 463

ANNUITY DEED.

To covenant on an annuity-deed stated to have been made between the defendant of the one part, and the plaintiff of the other, the defendant pleaded no memorial as required by 53 Geo. 3, c. 141, s. 2; the replication set out a memorial, stating the deed to have been between the defendant and his wife, of the one part, and the plaintiff of the other; the defendant having demurred to this replication, the Court refused to set aside the demurrer as frivolous. *Papineau v. King*, 226

APPEAL (NOTICE OF).

See NOTICE OF APPEAL.

APPEARANCE.

See DISTINGAS, 3, 4, 6.

1. The Court has no power to allow a plaintiff to enter an appearance for a defendant, where a copy of a writ has been left at his dwelling-house, and he has admitted the receipt of it. *Russel v. Lowe*, 233

2. Where a copy of a writ of summons had been given to the defendant's clerk, who was told to deliver it to his master, and the defendant subsequently came to the office of the plaintiff's attorney with the writ in his hand; the Court allowed the plaintiff to enter an appearance for defendant under the 12 Geo. 1, c. 29. *Aston v. Greathead*, 547

APPRENTICE.

See MANDAMUS, 4.

APPROPRIATION.

See CORPORATION.

ARBITRATION.

1. In debt for money had and received, and on an account stated, the defendant pleaded *nunquam indebitatus*, payment, and set-off; the cause and all matters in difference were referred to an arbitrator, who directed a general verdict to be entered for the defendant: *Semble*, that there was no inconsistency in the award as regarded the pleas of *nunquam indebitatus*, payment and set-off; but held, that the verdict being entered for the defendant on those pleas, the defendant could not be entitled to a verdict on the plea of set-off, all matters in difference being referred as well as the cause. *Malony v. Stockley*, 122

2. At the trial of a cause, a verdict was taken for the plaintiff, "subject to the award, order, arbitrament, final end and determination," of a legal arbitrator, who was authorized to award the verdict to be entered for the plaintiff or defendant, or a nonsuit to be entered, as he should think fit, and who was directed "at the request of either party to state any point of law upon the face of his award for the opinion of the Court:" *Held*, that it was not necessary for him to decide as to the amount of damages to be finally recovered, and to direct how judgment should be entered up, but that having disposed of all the issues separately, and having assessed damages separately, in respect of each subject-matter of complaint stated in the declaration, and having at the request of both parties raised questions for the opinion of the Court, his award was good.

The declaration alleged that the plaintiff was possessed of a house, and that the defendant was also possessed of a house next adjoining to that of

ARBITRATION.

the plaintiff, and that the defendant contriving to injure the plaintiff his agents and workmen, behaved and conducted himself so carelessly, negligently, and improperly, in pulling down the said house of the defendant, that by and through carelessness, &c., and in neglect to use due and proper precaution that behalf, divers large quantities of bricks, tiles, &c., fell from the house of the defendant, into and upon divers parts of the said house of the plaintiff, and upon and through divers windows and skylights of the plaintiff, and thereby, &c.: *Held*, that the declaration disclosed a sufficient cause of action, for that it complained not of a mere omission on part of the defendant, but of doing certain acts, by the negligent performance of which the plaintiff was injured.

The plaintiff, in his declaration complained that he, being possessed of a certain dwelling-house and defendant being also possessed of certain other dwelling-house adjoining that of the plaintiff, the defendant proceeded to pull down said house for the purpose of building another house on the site thereof; and that the defendant contriving, &c., by his workmen, behaved and conducted himself carelessly, negligently and improperly in and about digging and clearing the ground for the foundation of said house so built on the site of said first mentioned house, and in and about underpinning the party wall between that house and the house of the plaintiff, &c., and through the carelessness, &c., of the defendant and his agents, the party wall, and all the walls, floors, beams, &c., of the said house of the plaintiff were greatly sunk, cracked, weakened, and injured, &c.: *Held*, that the declaration disclosed a sufficient cause of action, for that the defendant

ant had no right to underpin the party wall either partially or wholly, unless that could be done without injury to the plaintiff's house, even although it might be doubtful whether the interests of the parties were several, or whether they stood in the relation of tenants in common.

The declaration stated that the plaintiff and defendant were respectively possessed of houses next adjoining to each other, in a street in the city of London, and that the defendant was purposing to pull down his said house, and to build another on the site thereof, and that preparatory thereto, he erected and placed a certain hoarding in front of his said house in such manner that the said hoarding enclosed part of a public footway running in front of the said houses of the plaintiff and defendant and that the defendant afterwards pulled down his said house and erected another on the site thereof, yet the defendant contriving, &c., wrongfully, wilfully, and injuriously, and without any reasonable or probable cause, delayed the pulling down and rebuilding of the said house for an unreasonably long time, and on that account, wrongfully, &c., kept and continued the said hoarding so erected as aforesaid for a long and unreasonable time, to wit, &c., whereby, &c. : The defendant pleaded, as to so much of the declaration as related to the keeping and continuing the said hoarding so erected, &c., that from time whereof, &c., there had been and then was within the city of London, a certain ancient and laudable custom, &c., that if any person had occasion to erect or pull down any building near to any public way within the said city, and had occasion for that purpose to erect, place and continue any hoarding in such a manner as thereby to obstruct or enclose any part of any public way and had applied to the Lord Mayor

of the said city for his license to erect, place and continue the same, such Lord Mayor had full power and authority to authorize, license and permit, &c., such person to erect such hoarding for such purpose as aforesaid, of such dimensions and in such manner and for such time as he thought proper for such purpose; and the person so applying for and obtaining such license hath been used and accustomed of right to erect such hoarding, &c., except so far as such custom hath been affected by the 57 Geo. 3, c. 29. (The Paving Act). The plea then went on to justify under the custom, alleging the license of the Lord Mayor and of the surveyor of pavements to have been duly obtained: Replication, protesting the custom, and alleging that the defendant of his own wrong, and without the residue of the cause in the plea mentioned, committed the grievances. The issue having been found for the defendant, upon a motion to enter judgment non obstante veredicto: *Held*, that the custom alleged was a reasonable custom: *Held*, also, that the plea was supported by the production of licenses from the Lord Mayor for the time being, (who gave liberty for the erection of a hoard, sixty-two feet in length, and projecting four feet from the premises about to be pulled down, to continue four weeks, provided the license of the surveyor of the pavements should also be obtained); and of the surveyor of the pavements, "to erect and continue four hoards in manner and for the time above mentioned," and that the hoard which was to be erected was sufficiently identified in the latter to be the same referred to in the former license. *Bradbee v. The Mayor, Commonalty, &c., of the City of London, Governors of Christ's Hospital*, 164

3. Upon a rule calling upon a defendant to shew cause, why he

directing payment on the 25th of January, 1842, of a certain sum "with interest:" *Held*, that under that award, upon a rule under 1 & 2 Vict. c. 110, s. 18, the plaintiff could recover no interest accruing subsequently to the 25th of January. *Id.*

5. An action of trespass to certain houses and lands of the plaintiff was referred to an arbitrator, who was to "settle at what price and on what terms the defendant should purchase the plaintiff's property." The arbitrator fixed a sum at which the defendant should "purchase the plaintiff's said property," and he directed that the defendant, after the conveyance of property, should be entitled to sue in the plaintiff's name in enforcing certain rights.

Held, first, that the award was not bad for uncertainty, on the ground that the arbitrator had not specified "the property."

Secondly, that the arbitrator had not exceeded his authority in empowering the defendant to use the plaintiff's name. *Round v. Hatton*,

446

6. Where a cause is referred to arbitration, and the *costs of the cause* are to abide the event of the award, the arbitrator must find specifically upon each issue.

Aliter, if the *costs of the reference and award* only are to abide the event. *Bourke v. Lloyd*,

452

7. A declaration in ejectment,

ARREST.

was entitled to the general costs of the cause, for that the assessment of damages to the plaintiff might be treated as surplusage. *Ross v. Clifton and Others*, 983

10. A cause was referred by Judge's order, which required the award "to be delivered to the parties, or either of them, or if they or either of them should be dead before the making thereof to their personal representatives." After several meetings, the defendant having died: *Held*, that the Court had no power to direct the arbitrator to proceed with the reference. *Lewin and Another v. Holbrook*, 991

11. A cause, in which issues were joined on pleas of non-assumpsit, payment, and set-off, was referred, together with all matters in difference, by a Judge's order, which directed the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator awarded that the plaintiff should pay to the defendant the sum of 16*l*. 10*s*. 2*d*., "being the balance which I find to be due from the plaintiff to the defendant," and that each party should bear his own costs of the reference, and a moiety of those of the award: *Held*, that the award was bad, and that there should have been a distinct finding upon each issue. *Pearson v. Archbold*, 1018

ARRAY.

See JURY.

ARREST.

1. A plaintiff who holds a defendant to bail under the 1 & 2 Vict. c. 110, should proceed with the action, notwithstanding he has taken an assignment of the bail-bond, by reason of the bail above not having been put in in due time.

Semble, that the rule, H. T., 7 Wm. 4, is rendered of no effect,

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ARTICLED CLERK. 1073

by the 1 & 2 Vict. c. 110. *Ede v. Collingridge*, 764

2. An order for arrest under the 1 & 2 Vict. c. 110, s. 3, may be made upon an affidavit, containing hearsay evidence, but in such case, the name of the informant must be stated. *Gibbons v. Spalding*, 811

ARREST (DISCHARGE FROM).

1. Where a defendant arrested by a Judge's order, under the 1 & 2 Vict. c. 110, applies to the Court for his discharge under the 6th section, the plaintiff may use additional affidavits in shewing cause against the application. *Id.* 746

2. Though on an application to the Court after the refusal of a Judge to discharge a defendant under the 1 & 2 Vict. c. 110, either party may produce fresh affidavits, yet those used before the Judge must be brought before the Court. *Heath v. Nesbitt*, 1041

ARREST (PRIVILEGE FROM).

See PRIVILEGE FROM ARREST.

ARTICLED CLERK.

See ATTORNEY (ADMISSION OF), 1, 2, 3, 4.

1. Where an articulated clerk has served a portion of his time with a particular master, who has gone abroad, and who cannot execute an assignment of the articles, the Court will allow him to serve the remainder of his time with another master, without an assignment of the articles; even where the assignee of the articles is not named at the time of the application. *Ex parte Hancock*, 54

2. Where an articulated clerk had been examined, and had obtained his certificate of fitness from the examiners in T. T., 1841, and did not take any further steps to procure his admission as an attorney, and did not within the next Term apply for an extension of the time during

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permitted the examiners to receive an office copy of the assignment, and to proceed to the examination of the applicant, as if the original was produced to them, and directed also that the certificate of a Master of this Court, that the original assignment was so filed, should be deemed sufficient, on granting the Judge's fiat for the admission of the applicant as an attorney. *Ex parte Buckle*, 676

4. Where an attorney had absconded, and had assigned all his property to an individual, the Court refused, on the application of an articted clerk, to call upon the latter to refund any portion of the premium paid on his articles, but granted a rule for discharging the clerk from his articles. *Ex parte Carnley*, 945

ASSIZES.

See SUBPENA, 1.

ATTACHMENT.

See ARBITRATION, 3.

INTERROGATORIES, 1.

SHERIFF, 1.

SUBPENA, 2.

1. Although where a demand of money payable under an award is made by a stranger, not a party to

ATTORNEY (ADMISSION OF).

application to sign judgment, and no information respecting him could be obtained, the Court allowed judgment to be signed, on producing an affidavit of his handwriting, as well as that of the defendant. *Edwards v. Penhey*, 425

ATTORNEY.

See ABATEMENT.

ATTORNEY (RE-ADMISSION OF).
CORPORATION.

NOTICE (OF ACTION), 2.

NOTICE (TO PRODUCE).

PRIVILEGE (FROM ARREST).

TAXATION, 1.

WARRANT (OF ATTORNEY), 2,
3, 6, 7.

The Court refused to grant a rule, calling upon an attorney to deliver up papers, when it appeared that the documents had come into his possession as executor to his father, who had been attorney to the applicant, but where the applicant did not adopt the son as his professional agent. *Ex parte Nicholls*, 423

ATTORNEY (ADMISSION OF).

1. Where an applicant to be admitted an attorney while under articles of clerkship, by medical advice and with the consent of his master, went to sea, and after a lapse of five months, entered as a student at Haward University in the United States, where he diligently pursued the study of the law for seven months, and then returned to the completion of his articles, but he served only five years, including the period of his absence, the Court allowed him to be examined in order to be admitted an attorney. *Ex parte Henry Hilton Cross*, 692

2. Where the examiners have a doubt as to the sufficiency of the service of articles of clerkship by an applicant to be admitted an attorney, and on that ground refuse to examine

ATTORNEY GENERAL. 1075

him, the Court will grant a rule directing his examination de bene esse. *Ex parte Llewellyn*, 701

3. Where an applicant, while under articles of clerkship, discharged the duties of auditor of a Poor Law Union, which, it was sworn, occupied him for a very inconsiderable period of time, and to which he never gave any attention, until after the usual office hours of his master, the Court held that that occupation did not render the service insufficient, *Id.*

ATTORNEY AND AGENT.

See SERVICE (OF JUDGE'S ORDER).

ATTORNEY (BILL OF).

See COSTS (IN THE CAUSE).

A bill signed by one of two attorneys in partnership, thus: "For self and Robert Owen, James H. Dixon:" Held, a sufficient signature within the 2 Geo. 2, c. 23, s. 23. *Owen and Dixon v. Scales*, 304

ATTORNEY'S CLERK.

See SECURITY FOR COSTS, 1.

ATTORNEY AND CLIENT.

See ATTORNEY.

As a general rule, an attorney cannot abandon a suit before its termination, and without giving his client reasonable notice, though particular circumstances may justify him in so doing.

Therefore where an attorney did not proceed with a suit, it was held, that he could not recover for the work actually done, he not having proved a notice, or shewn why he abandoned the cause. *Nicholls v. Wilson*, 1031

ATTORNEY GENERAL.

See CROWN (DEBTOR), 2.
INTERROGATORIES, 2.

ATTORNEY RE-ADMISSION OF.

Where an attorney had ceased to take out his certificate and to practice for forty years, and had been employed during that time, as a collector of rents, and agent, the Court refused to allow him to be re-admitted. *Ex parte Ridge*, 682

AUDITORS.

See ACCOUNT.

AWARD.

See ATTACHMENT, 1.

A motion (under the 1 & 2 Vict. c. 110, s. 18,) calling on a party to pay money and costs, found due by an award, should be made upon affidavit of service of a copy of the award and allocatur. *Pearson v. Archbold*, 769

BAIL-BOND.

See ARREST, 1.

BAILMENT.

See PLEA, 1.

BANKRUPT.

See COMPANY (PUBLIC), 3.

INTERPLEADER, 3, 6.

LACHES, 1.

PLEA, 6.

PUIS DARREIN CONTINU-
ANCE.

SHERIFF, (See NOTICE).

WARRANT (OF ATTORNEY),
3.

WARRANT (OF COMMIS-
SIONERS).

1. In an action by the assignees of a bankrupt's estate, for a debt due to the estate, the bankrupt was called to negative a plea of payment to himself, of the debt in the declaration mentioned before his bankruptcy: *Held*, that he was a competent

witness, and that he might pro-
parol that he had released the
plus of his estate, without produ-
or otherwise proving any de-
release. *Lucas and Others, v. nees v. Eades*,

2. To a count on trover, for-
seized by defendant, as sheriff
defendant pleaded, not possessed
plaintiff claimed to be entitled
goods in question, under a b
sale, by which they had been
veyed to him by C.; it was p
that C. had continued in poss-
of the goods with the consent
plaintiff, after the execution o
bill of sale, and that while so in
session, he became bankrupt;
assignees, under the fiat, at fir
podiated, by the act of their
senger, all title to the goods
subsequently upon their being s
by the sheriff, at the suit of an
person, asserted their title, and
ing indemnified the sheriff, rec-
from him the proceeds of the s
the goods.

Held, first, that the goods we-
the order and disposition of the l
rupt, at the time of his bankru-
with the consent of the true o-
within the 6 Geo. 4, c. 16, s
secondly, that under the plea o
possessed, the defendant in the
was entitled to set up the title
assignees to the goods; and
that title reverted back to the
of the bankruptcy, notwithstan-
the act of the messenger unde-
fiat. *Leake v. Loveday and An*

3. The assignees of a bank-
may sue alone on a promissory
given to the bankrupt's wife b
marriage. *Yates and Others, v. nees of Aldrich, a Bankrupt Sherrington*,

4. The decision of the Cou-
Exchequer, "that the 2 & 3
c. 29, has not rendered valid, ex-
tions on judgments on warran-
attorney, executed by seizure,

a secret act of bankruptcy, but not completed by sale of the goods, prior to the issuing of the fiat," affirmed on error. *Shey and Others v. Carter*, 831

5. To an action of trespass, quare clausum fregit, a plea of the plaintiff's bankruptcy is bad on general demurrer. *Spence v. Rogers*, 999

BASTARD.

See VAGRANT.

The officers of a parish having taken proceedings under the 2 & 3 Vict. c. 85, s. 1, before justices in petty session to procure the reimbursement of certain sums expended in the maintenance of a bastard child, of which the defendant was alleged to be the father; and the defendant having required that the charge should be heard at sessions, and entered into recognizances under section 3 of that act, and an order of sessions having been subsequently obtained, the Court refused to entertain objections to the recognizance so entered into, and to the summons by which the defendant was called upon to appear before the petty sessions, the recognizance and summons not being set out in the order of sessions, but that order reciting that it had been "duly certified to this Court that the said defendant having had due notice to appear, &c., did, at such petty sessions, enter into a recognizance," &c.

The order of sessions further recited, that "it hath been duly certified that at a petty sessions, &c., the guardians and overseers of the poor of the parish of W., did then and there make information and application, &c.;" it was sworn that the parish of W., formed part of the union of W. and B., and it was objected that the guardians only should have applied: *Held*, nevertheless, that the order was sufficient, for that the application being stated to be

made by the guardians, the addition of the word "overseers," was immaterial.

The order further recited, that "the guardians and overseers of the poor of the said parish of W., did charge T. G. of T., in the parish of A., &c., with being the putative father of the said bastard child, and did at the same petty sessions further apply to the justices for an order on the said T. G., &c., to reimburse *such* parish for the maintenance and support of such child, &c.:" *Held*, that although the parish of A. was the last antecedent to *such* parish, a reasonable construction must be put upon the sentence, and the parish of W. must be taken to be meant. *Regina v. Thomas Goodall*, 382

BILL OF EXCHANGE.

See DECLARATION, 3.
PLEA, 5.

BILL OF SALE.

See STAMP, 1.

BLOCKADE.

See PLEA, 4.

BREACH (OF THE PEACE).

See PLEA, 10.

CALLS.

See RAILWAY COMPANY, 1.

The 3 & 4 Vict. c. 126, s. 1, provides "that all actions or suits against any persons already indebted, or who may be hereafter indebted to the Monmouthshire Iron and Coal Company," and all other proceedings upon or in respect of any present or future liability to the said company, or upon any bonds, covenants, contracts, or agreements, which already have been or hereafter shall be given

authorized to commence and carry on an action of debt for calls against a proprietor of shares in the capital of the company, and that the act was not intended to confer such a right upon him in actions between the company and third persons only.

In an action of debt for calls by the Secretary of the Monmouthshire Iron and Coal Company, the declaration alleged that the defendant was the duly registered proprietor of sixty shares in the undertaking, and recited, that by a certain indenture of settlement bearing date, &c., to wit, the 25th of October, 1836, it was provided that there should be a board of directors of the said company; that the directors should meet together and that it should be lawful for them whensoever they thought proper, to come to a resolution that the proprietors of shares in the capital of the said company, (except the proprietors, for the time being, of certain shares in the said indenture mentioned, and thereby exempted from the payment of calls,) should be called upon to pay at any time after the expiration of three calendar months from the date of the said indenture, and after the expiration of three calendar months from the time appointed for the payment of any previous instalment, such further in

CAPIAS AD SATISFACIENDUM.

1. The venue being laid in Surrey, final judgment was signed on the 22nd of April, 1840, and on the same day, a testatum ca. sa. issued into Oxfordshire, upon which the defendant was arrested on the 19th of June, 1841, an original ca. sa. issued into Surrey, bearing date the same day as the testatum writ, and was returned, generally, non est inventus: *Held*, no irregularity. *Green-shields v. Harris*, 272

2. Where a defendant was arrested on a ca. sa., issued upon a judgment recovered by default, on the 5th of April; it was held too late to apply to set aside the writ on the 25th of April, upon the grounds, first, that the writ was irregular, for that there was no indorsement of the defendant's place of abode, and addition; and, secondly, that in point of fact, the defendant was not the party really intended to be sued in the action; for there is no distinction to be drawn between the case of a prisoner, and of any other person: *Held*, also, that in the particular case, the defendant, having suffered judgment by default, was precluded from objecting that he was not really liable, and had been sued in mistake. *Davies v. Watkins*, 930

CARRIER.

See INTERPLEADER, 3.

The plaintiff declared in case, and alleged that the defendants were common carriers, and had received certain goods, to be carried from London to Birmingham, and there to be delivered for reasonable hire; that it was the duty of the defendants safely and securely to carry and deliver the goods, but that although a reasonable time for carrying and delivering the same had long since elapsed, yet that the defendants, neglecting their duty, did not deliver

the goods to the plaintiff, and that they were, by the negligence of the defendants wholly lost to the plaintiff. Issue. At the trial, the negligence of the defendants, and the non-delivery of the goods, within a reasonable time, were substantiated to the satisfaction of the jury:

Held, after verdict, that the plaintiff was entitled to recover damages for such non-delivery, for that the breach alleged in the declaration might be read as, in effect, stating that the defendants did not, within a reasonable time, nor at any time afterwards, deliver the goods to the plaintiff, the duty to deliver within a reasonable time, being merely a term engrafted by legal implication, upon a promise or duty to deliver generally.

Quare, whether the allegation would have been sufficient upon special demurrer, if the only breach had been the non-delivery within a reasonable time. *Raphael v. Pickford and Others*, 916

CASE.

See TRESPASS, 2.

CAUSE (OF ACTION).

See ARBITRATION, 2.

CERTIFICATE (OF JUDGE).

See JUDGE (CERTIFICATE OF).
SPECIAL JURY.

CERTIORARI.

1. An affidavit must be produced in support of an application for a certiorari. *Regina v. The Southampton Railway Company*, 53

2. Upon an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for demolishing a house, it appeared in evidence that the means of destruction used was fire; an objection was thereupon taken that the indictment was not sustained, which, however, was

overruled, and the prisoners were convicted and sentenced to transportation: The Court refused to grant a writ of certiorari to bring up the record of the conviction, with a view to proceedings to cause it to be quashed. *Regina v. Whiston and Others*, 408

3. Where an indictment had been preferred against a person for exposing to sale unwholesome meat, and the meat having been seized, the defendant in the indictment, brought an action for the trespass committed in the seizure, the Court, at the instance of the prosecutor, granted a certiorari to remove the indictment from Quarter Sessions to this Court for trial. *Regina v. Bromhead*, 715

4. On the 20th of April, the Court of Quarter Sessions granted a case for the opinion of the Court of Queen's Bench; on the 13th of October, notice in writing of an intended application for a writ of certiorari to bring up the order of Sessions, was served upon two justices; on the 20th of October, an application was made at Chambers, for a Judge's fiat allowing the issuing of a certiorari; no Judge being in town on that day, an affidavit of notice to the justices, and of the other necessary facts, was sworn before a commissioner, and on the same day, the affidavit was filed at the Crown Office, and a writ of certiorari issued; on the 21st of October, the Judge's fiat was obtained and filed at the Crown Office. Upon motion to quash the writ of certiorari quia improvidè emanavit,

Held, first, that the notice to the justices on 13th of October, under the 13 Geo. 2, c. 18, which requires six days' notice of an intended application for a certiorari, was in time, and that such notice on the 14th of October would have been sufficient.

Held, secondly, that upon shewing cause against the rule for quashing the writ, which was sought to be sus-

tained upon the ground that the writ had been granted upon an insufficient affidavit of the service of notice was competent to the party shewing cause, to produce affidavits in explanation of such affidavit of service although, *semble*, no new facts could be introduced. Therefore, when the original affidavit, the deponent swore that he had served one of the justices, by leaving a copy of notice at his Chambers on the 1st of October, and this affidavit was rejected to as being insufficient: it was held, that an affidavit might be produced, stating in explanation, that the notice had been left in the letter box, at the Chambers of the magistrate, and that the magistrate since acknowledged that he "duly received the notice with other letters of that day," and such affidavit was held sufficient, as shewing that due service had been effected.

Admitted, that where an order of sessions was made on the 20th of April, and an application was made at Chambers for a certiorari, on the 2nd of October, that such application "within six calendar months after such order," within the meaning of the 13 Geo. 2, c. 18, s. 5.

Quære, whether under the circumstances above stated, of the absence of the Judge from town, the application on the 20th of October, was a valid application within the meaning of the statute.

Held, also, that the certiorari having issued on the 20th of October, and the fiat of the Judge not having been obtained until the 21st, the certiorari was unwarranted and must be quashed. *Regina v. The Inhabitants of St. Mary, Whitechapel*, 1

CESTUI QUE TRUST.

See INTERPLEADER, 6.

COGNOVIT.

CHALLENGE.

See **WAIVER**, 2.

CHARGING STOCK.

1. The Court has jurisdiction to review an order absolute, charging stock under the 1 & 2 Vict. c. 110, ss. 14 & 15. *Fowler v. Churchill*, 562

2. Where by the terms of a will, it is doubtful whether a defendant takes a beneficial interest, such order may be made, charging the stock conditionally, *Ib.*

3. Notwithstanding an order absolute under the 1 & 2 Vict. c. 110, ss. 14 & 15, charging stock in the names of trustees, the Bank of England is bound to pay the dividend to the trustees, who are liable in equity, for its proper distribution, 767

CHARITABLE ASSOCIATION.

See **EJECTMENT**, 12.

CHINA.

See **PLEA**, 4.

COGNIZANCE.

A cognizance for double rent, under the 11 Geo. 2, c. 19, s. 18, should show the terms of the tenancy, and that a sufficient notice to quit has been given. *Humblestone v. Dubois*, 506

COGNOVIT.

1. A cognovit was attested as follows:—"Witnessed by me, W. P., as the attorney of the said W. B., attending at the execution hereof, at his request, and expressly named by him:" *Held*, insufficient. *Hibbert v. Barton*, 434

2. A cognovit contained two attestations, first "Witness, J. B.," secondly, "Signed in the presence of me, the undersigned, and I hereby certify and declare, that I am the

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attorney of the said W. P., and that I attended at his request, to inform him of this cognovit, and that I have informed him of the nature and effect hereof, and I hereby subscribe my name as his attorney, R. R.:" *Held*, that the second attestation was sufficient, and was not invalidated by the first. *Ledgard v. Thompson*, 766

COMMISSIONER.

See **AFFIDAVIT**, 2, 5.

COMMISSIONERS (WARRANT OF).

See **WARRANT (OF COMMISSIONERS)**.

COMPANY, (PUBLIC).

See **CALLS**.

RAILWAY COMPANY. VARIANCE, 1.

1. To an action for money lent, the defendants pleaded that the cause of action accrued against a banking co-partnership, established under the 7 Geo. 4, c. 46, of which defendants were members, and are sued as such, that B. and D. had been duly appointed and registered as public officers of the co-partnership, to sue and be sued on behalf of the same, and that the said persons so appointed and registered as such public officers at the commencement of the suit, were resident within the jurisdiction of the Court: *Held*, on special demurrer, first, that the plea was good, and that the individual members of the company were not liable to be sued, but that the remedy was against the company, by their public officer.

Secondly, that the plea was matter in bar, and not in abatement.

Thirdly, that the plea did not amount to an argumentative denial of the contract.

Fourthly, that it was no ground of objection that the plea did not "allege that B. and D. were public offi-

minated as such. *Steward, Public Officer, v. Greaves and Others*, 485

2. An act of Parliament, incorporating a company, enacted, that every judgment against the nominal defendant, might be "executed against the person and estate of every shareholder, as if he had been by name a party to such proceedings, provided that no such execution should issue without leave of the Court, and after notice of such motion."

Held, that the proper mode of proceeding to execution against a shareholder, was by *scire facias*.
Clowes v. Bretell, 528

3. Where a banking co-partnership is sued in the name of their public officer, the Court will not permit the latter, though a member, to plead his individual bankruptcy together with other pleas, the plaintiff undertaking not to sue out execution against his body, land, or goods. *Steward, Public Officer, v. Dunn, Public Officer*, 742

4. An act of Parliament required a company to enrol in Chancery, a memorial of the names, residences, and descriptions of the shareholders, and also enacted, that the expenses of obtaining that act, should be paid out of the funds of the company, in preference to all other payments. On motion for a *scire facias* to have

against all or any of the shareholders, &c., provided that no such execution shall be issued, without leave first granted by the Court upon motion in open Court: *Held*, that the shareholders could only be charged by sci. fa.: *Semle*, that it is necessary that motion in open Court shall be made for such writ of sci. fa. *Wingfield v. Barton, Secretary, &c.*, 355

8. In an action of assumpsit, the declaration alleged that the plaintiff was the public officer of certain persons united for the purpose of carrying on the trade and business of bankers, according to the statute 7 Geo. 4, c. 46, and had been duly nominated and appointed, and then was one of the public officers of the said co-partnership, according to the force, form, and effect of the said statute, and then claimed various sums of money for money lent; shares sold, and for work and labour of the said co-partnership, done, performed, and bestowed as the bankers of and for the defendant: *Held*, upon motion, in arrest of judgment, that the declaration sufficiently disclosed, that the co-partnership was actually carrying on the business of bankers. *Davidson, Public Officer, v. Bower*, 115

COMPETENCY.

See BANKRUPT, 1.
NEW TRIAL, 6.
WITNESS, 1, 3, 5.

CONSENT RULE.

See EJECTMENT, 10.

CONSPIRACY.

See WITNESS, 4.

CONSTABLE.

See NOTICE (OF ACTION).

CONTINUANCE (OF PROCESS).

See SUMMONS, 2.

CONVICTION.

1. A rule nisi for a mandamus to compel justices to enter continuances, and hear an appeal against a conviction under the Turnpike Act, having been obtained; it was held, that it was no objection to counsel appearing to shew cause, that they were instructed by the attorney of the trustees of the road, on which the offence was alleged to have been committed by the applicant, and not by the justice before whom, or the informer by whom the complaint was made, on which the conviction took place, and to whom, respectively, the rule was addressed. *Regina v. The Justices of Middlesex*, 719

2. A conviction having taken place under the Turnpike Act, on Monday, the 2nd of May, and notice of appeal served on the following Monday, the 9th of May: *Held*, that it was too late, for that it was not "within six days after the cause of complaint," within the provisions of the 87th section of the 4 Geo. 4, c. 95, *Ib.*

3. An appeal came on to be heard on the 6th of July, when it was adjourned, by reason of the press of business at Sessions; on the 7th of August, (the next appeal day,) it was again adjourned "by consent of counsel:" *Held*, that the respondents, on a subsequent appeal day, were nevertheless entitled to call for proof of the original notice of appeal, or to object that the notice given was insufficient, *Ib.*

CO-PARTNERSHIP.

See COMPANY, (PUBLIC).

COPY.

See STAMP, 2.

1084 COURT OF REQUESTS.

COPYHOLD.

See INSPECTION OF DOCUMENTS.

COUNSEL (HEARING).

Where several defendants, whose interest is identical, plead separately, similar pleas, which are demurred to, one counsel only is entitled to be heard on the argument. *Willson v. Carey and Cunningham*, 530

COUNSEL, (SIGNATURE OF).

Though a replication of nul tiel record concludes with an improper verification, it does not, therefore, require counsel's signature. *Thompson v. Nicholas*, 226

COUNTY COURT.

1. The Middlesex County Court Act, (23 Geo. 2, c. 33,) does not apply to cases in which the cause of action arose within the city and liberty of Westminster. *Todd v. Emly and Others*, 1045

2. The common law jurisdiction of the Middlesex county Court is not taken away by the 23 Geo. 2, c. 33, *Ib.*

3. *Quere*, whether the 19th section of the 23 Geo. 2, c. 33, (which deprives the plaintiff of costs, where he recovers less than 40s. in the Superior Courts,) applies to a verdict on a plea collateral to the merits of the action, as a plea, puis darrein continuance of the non-joinder of a co-contractor, *Ib.*

COURT OF REQUESTS.

Under the 25 Geo. 2, and 47 Geo. 3, the Birmingham Court of Requests' Acts, if a plaintiff recovers a sum less than 5*l.*, he is not entitled to his costs, although he may, *bonâ fide*, have brought his action for a much larger sum. *Allen v. Turner*, 21

CORPORATION.

CORAM VOBIS.

See AMENDMENT, 2.

CORONER.

See COSTS, 3.

CORONER'S INQUISITION.

Four coroners' inquisitions found that the deaths of four persons were respectively caused on a certain day, by a steam-engine, and each inquisition imposed on the engine a deodand of 125*l.* The deodands having been estreated into this Court, under the 3 & 4 Wm. 4, c. 99, s. 29, the Court refused to stay proceedings on three of the inquisitions, on payment of 125*l.*, on the ground that the instrument moving to the death of the party could not be twice forfeited for the same accident, but left the parties to their remedy, by traversing or setting aside the inquisition. *The Queen v. The Eastern Counties Railway Company*, 293

CORPORATION.

See EJECTMENT, 3.
TRESPASS, 1.

The retainer or appointment of an attorney by a corporation, must be by common seal.

Where an attorney, who was town-clerk of a municipal borough duly appointed under seal, acted also as attorney of the corporation, in various suits at law and in equity, although his proceedings as such attorney were directed, recognised, and acknowledged by the resolutions of the town council, it was held that there being no appointment under seal, he could not recover the amount of his bills of costs from the corporation, for the business which he had transacted on behalf of that body.

Where in an action by an attorney

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against a municipal corporation for divers bills of costs, the cause was referred, and the arbitrator found that a certain sum of money had been paid to the plaintiff, by virtue of a resolution of the town council, in part payment of his general account, and that the plaintiff had applied that money in discharge of two bills for business done, in respect of which he had no sufficient retainer, and in part discharge of a third bill for extra costs incurred by him in his capacity of town-clerk: it was held by the Court, that such appropriation by the plaintiff was authorized, although he could not have recovered the amount of the two first named bills by an action at law. *Arnold v. The Mayor, Aldermen, and Burgesses of the Borough of Poole*, 574

COSTS.

See ARBITRATION, 6.

EJECTMENT, 10.

JUDGE (CERTIFICATE OF).

MANDAMUS, 6, 7, 8.

OUTLAWRY, 2.

PAUPER, 3, 5.

WRIT OF TRIAL, 2, 4.

1. In an action of trespass for entering the close of the plaintiff, breaking the soil, digging and carrying away minerals, the defendant pleaded that the plaintiff was not possessed of the minerals; a justification of the entry, &c., under an immemorial custom; and a justification of the entry, &c., subject to his making compensation to the plaintiff, for surface damage; replication, taking issue upon the plea, of not possessed; traversing the unqualified right of entry; and alleging a demand of compensation and refusal; the plaintiff recovered a verdict upon the issue on the unqualified right, but the jury found that the defendant had tendered a reasonable compensation for the

COSTS (IN THE CAUSE). 1085

damage done, and a verdict was entered for him on the issue on the qualified right: *Held*, that under the issue on the plea of not possessed, the defendant was entitled to the costs of witnesses subpoenaed, but not examined, to prove the right of entry, but that those costs must be estimated separately, and as contradistinguished from those which arose upon the issue on the right to dig and carry away the minerals. *Paddock v. Forrester and Others*, 125

2. Cause cannot be shewn in the first instance against a rule for costs of the day, for not proceeding to trial pursuant to notice, although notice of the motion has been given. *Alderley v. Storey*, 835

3. A sheriff being defendant in an action for the recovery of a sum under 20*l.*, the plaintiff took out a summons to try the cause before the coroner, which was opposed, on the ground that the Judge had no jurisdiction so to order. After notice of trial, the defendant applied for leave to withdraw his plea, on payment of debt and costs, and an order was made accordingly: *Held*, that the plaintiff was entitled to costs on the lower scale only. *Levy v. Magnay*, 512

4. A plaintiff obtained a verdict, leave being reserved for defendant to move to enter a nonsuit or a verdict for himself. A rule nisi was accordingly obtained, and on shewing cause, the Court directed a special case, upon which they gave judgment for the defendant: the special case was then turned into a special verdict, and the judgment of the Court below affirmed: *Held*, that the defendant was entitled to the costs of the trial. *Tobin v. Crawford and Others*, 541

COSTS (IN THE CAUSE).

Where, after action brought on an attorney's bill, the defendant taxes

COSTS (SETTING OFF).

See **SECURITY FOR COSTS, 2.**

COURT (JURISDICTION OF).

See **CHARGING STOCK, 1.**

CROWN (DEBTOR), 2.

ERROR, 1.

INTERPLEADER, 4, 5.

RELEASE.

SHERIFF, 3, 8.

COVENANT.

See **ANNUITY DEED.**

DAMAGES.

DEBT.

SET-OFF, 1.

CRIMINAL INFORMATION.

Upon a motion for a criminal information, it appeared that the applicant was an attorney, and an officer of this Court, and the person against whom the application was made, was a magistrate, and that the latter had assaulted the former in revenge; it was suggested, for his having conducted some proceedings against him, on behalf of a client, before justices for a previous assault; the Court refused to interpose its extraordinary protection to the applicant, but left him to his remedy by indictment or action at law.

Ratna v. Ayyanar

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DECLARATION.

pair by a lessee against his sub-lessee, the former cannot recover as special damage the costs of defending an action brought against him by his lessor, on account of the same dilapidations. *Walker v. Hatton*, 263

DATE.

See LIMITATIONS (STATUTE OF), 2.
NULLITY.

SUMMONS, 1.

DATE (EVIDENCE OF).

The recital in an order of adjudication, (under 1 & 2 Vict. c. 110), of the vesting order is evidence of its date, and that the title of the assignee accrued from that period.

Semble, that the recital of the vesting order in the appointment of the creditor's assignee, is not evidence of the date of such order. *York, Assignee of Moody, an Insolvent Debtor, v. Brown*, 283

DEATH.

See ARBITRATION, 10.

DEBT.

See ACCOUNT STATED.

Debt will not lie against one of several covenantors on a covenant by them, or some or one of them, to pay a sum of money. *Harrison v. Matthews*, 318

DECLARATION.

See ARBITRATION, 2.

CALLS.

CARRIER.

COMPANY (PUBLIC), 8.

PLEA, 16.

1. A declaration stated that the plaintiff being possessed of a bill of exchange, by a certain agreement, defendant bought of the plaintiff, and the plaintiff bargained and sold to the defendant the said bill for

DECLARATION. 1087

200*l.*, and it was agreed that upon one E. handing over to the plaintiff the said sum of 200*l.*, the said bill should be delivered to E. It then alleged mutual promises, and that the plaintiff was ready and willing to deliver the bill, and that although the defendant had paid 50*l.*, parcel of the 200*l.*, yet, (although requested so to do,) he had not paid the residue: *Held*, bad, for want of an averment that a reasonable time had elapsed, notwithstanding the defendant had pleaded over. *Stavert v. Eastwood*, 988

2. A declaration stated that the plaintiff demised certain premises to the defendant, subject to a covenant that the defendant should expend 100*l.*, in substantial improvements, additions and repairs, under the direction and with the approbation of some competent surveyor to be named by the plaintiff; Breach, that defendant would not expend the sum of 100*l.*, in substantial improvements, &c., although the plaintiff was always ready and willing to appoint a competent surveyor.

Held, bad on special demurrer. *Coombe v. Greene*, 1023

3. In assumpsit by indorsee against drawer of a bill of exchange, the omission of a promise to pay is ground of special demurrer. *Smith v. Cox*, 1035

4. A declaration alleged that the plaintiff agreed to sell, and the defendant to buy, certain land, for 120*l.*, which the defendant agreed to pay on or before four years, with five per cent. half yearly, until paid: Averment, that the four years had not expired, and that the 120*l.* had not been paid, and that 12*l.* was due for interest.

Held, that the declaration was good, without averring title to the land, or that the plaintiff was ready and willing to convey. *Wilks v. Smith*, 215

1. Although in an action of assumpsit, the plaintiff may reply de injuriâ to a plea alleging matter of excuse, he is not bound to do so, but may traverse the material allegations in the plea. *Garten v. Robinson*, 41

2. To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that after the bill became due, he paid the drawers, then being the holders, the sums of 4*l.* 12*s.* and 2*l.* 10*s.*, which sums, together with the price and value of a horse, which the defendant had then sold to the drawers, and which it was then agreed should be set-off against the defendant's acceptance, the drawers accepted in satisfaction and discharge of the amount of the bill, and that the bill was not transferred to the plaintiff, until after the said satisfaction, and after it became due: Replication, that "the plea and the statements therein, are not true in substance, and in fact."

Held, on demurrer to the replication; first, that the plea shewed matter of excuse, to which de injuriâ might be replied; secondly, that the plea was not bad, by reason of its not being pleaded to the damages as well as the debt.

Thirdly, that the plea was bad, for omitting to state the amount for which the horse was sold: *Semble*,

dorsees and holders ; and that the plaintiffs always, &c., had notice and knowledge of the premises : Replication, de injuriâ : *Held*, upon special demurrer, that the plea was a plea containing matter of confession and excuse, and that the replication was good. *Scott and Others v. Chappelow*, 78

DEMURRER (FRIVOLOUS).

See ANNUITY DEED.

1. Where a declaration in assumpsit, stated that a warrant of attorney had been given to secure a sum payable in respect of a sale of a business, and that afterwards in consideration of forbearance of legal proceedings, in respect of an alleged breach of stipulation regarding the goodness of the business, a deduction was made in the sum secured by the warrant, and further time given for the payment of the residue, and that default had been made in the payment of certain sums which became due under the parol agreement, the Court held a demurrer to this declaration, on the ground that the form of action should have been covenant and not assumpsit, frivolous, and set it aside on motion. *Twight v. Prescott*, 4

2. An acceptance in this form, "payable at Messrs. Cunliffe and Co., Bankers, London," is a general acceptance, since the 1 & 2 Geo. 4, c. 78 ; it is, therefore, a frivolous demurrer to a declaration by the indorsee against the acceptor of such a bill, that it was not alleged to have been presented for payment at the bankers mentioned in the acceptance. *Skelton v. Halstead*, 69

3. In an action by an indorsee against the acceptor of a bill of exchange, it is not necessary to allege the acceptor's notice of the indorsement, although such an allegation is introduced into the forms given by the rules of T. T., 1 Wm. 4, and a

demurrer or the ground of such allegation being omitted, is frivolous, *Ib.*

4. To a declaration on a deed of apprenticeship, the defendant pleaded that the said "indenture," was not his deed : *Held*, that a special demurrer to such plea was not frivolous. *Bird v. Holman*, 234

5. Where the declaration in an action of assumpsit on a promissory note, contained no statement of the time when the note became payable, and the defendant demurred thereto on that ground, the demurrer was set aside as frivolous. *Gurney v. Hill*, 936

DEODAND.

See CORONER'S INQUISITION.

DEPARTURE.

To a declaration containing counts on several bills of exchange, for goods sold, &c., the defendant pleaded a release.

The replication set out a deed, by which the plaintiffs and other creditors of the defendant, agreed to release the defendant from their claims upon his paying them a composition, and giving them certain promissory notes for the amount, with a proviso, that in case of default in payment of any or either of the notes, the release should be void ; the replication then averred default in payment of one of the notes.

Rejoinder, that before default, the defendant delivered to the plaintiffs another promissory note in lieu of the note dishonoured.

Held, that the rejoinder was a departure from the plea. *Nevill and Others v. Boyle*, 747

DEPONENT (DESCRIPTION OF).

A deponent, who describes himself as "agent of the above-named plaintiff in this cause," sufficiently complies

with 1 Reg. Gen., H. T., 2 Wm. 4, s. 5, which requires that the addition of every person making an affidavit, shall be inserted therein. *Luxford v. Groombridge*, 332

DESCRIPTION (OF DEFENDANT).

See DEFENDANT (DESCRIPTION OF).

A description of the defendant in a writ of summons, as "R. S., of the city of London," is insufficient, and in such case, the application may be to set aside the service and copy of the writ. *Cotton v. Sawyer*, 310

DESCRIPTION (OF DEPONENT).

See DEPONENT (DESCRIPTION OF).

DETINUE.

To a declaration in detinue for 1,000 yards of broad-cloth, and two pieces of other cloth, the defendant pleaded that the said cloths were delivered to him to be milled, and that he detained them as a lien for the price. It appeared that eight pieces of cloth had been originally delivered to the defendant, six of which he had re-delivered: *Held*, that the plea only applied to the two pieces detained. *Coombs, Administratrix, v. Noad*, 315

DILAPIDATIONS.

See DAMAGES.

DISTRESS.

See REPLEVIN.

WARRANT (OF JUSTICES).

DISTRIBUTION (STATUTES OF).

See WITNESS, 2.

DISTRINGAS.

1. The Court will not grant a writ

DISTRINGAS.

of distringas to proceed to outlaw against a peer of Parliament; will grant such a writ to compel appearance. *Taylor v. Lord St. de Rothsay*,

2. This Court will not grant distringas where three calls and appointments having been made of the calls being on one day, the appointments being those of the person seeking to serve the writ: *See* that if an appointment came to the defendant, a second call on the same day, in pursuance of such appointment, would in such a case be sufficient. *Jamieson v. Wilkins*,

3. Where a writ of distringas executed, and the sheriff returned nulla bona, the plaintiff is entitled to an order to enter an appearance, though the case is not distinctly referred to by the statute, 2 Wm. c. 39, s. 3. *James v. Laurie*,

4. The Court will not grant a writ of distringas to proceed to outlawry against a peer, having privilege of Parliament; but where, on an application for such a writ, there were sufficient materials brought before the Court to justify, in an ordinary case, the issuing of a writ of distringas to compel appearance, a distringas to compel appearance was granted. *Snapthorpe v. The Earl of Waldegrave*,

5. An affidavit in support of an application to set aside a writ of distringas on the ground of the insufficiency of the statement of the attempts to serve the defendant with the writ of distringas, in the affidavit on which the writ was granted, must deny that a copy of the writ of summons reached the defendant's hands. *Muggeridge v. Ward*,

6. Upon application for leave to enter an appearance for the defendant, after the issuing of a writ of distringas, to which the sheriff has returned nulla bona, and non est inventus, the affidavit must state affirmatively that no appearance has been entered. *Read v. Forde*,

7. Writs of distringas must be returned not less than fifteen days after the teste, exclusive both of the day of teste and return. *Chambers v. Smith*, 1057

8. Where the indorsement on the writ of summons claimed a certain sum of money with interest, but did not specify the day from which it was claimed that the interest should run, the Court granted a distringas to compel appearance upon the usual affidavit, leaving it to the defendant to raise objection to the regularity of the writ. *Fitzgerald v. Evans*, 916

DISTRINGAS JURATORES.

See AMENDMENT, 2.

DIVISIBILITY.

See PLEA, 13.

DOCUMENTS, (INSPECTION OF).

See INSPECTION (OF DOCUMENTS).

DUFFING

See PLEA, 14.

DUPLICITY.

1. To trover for scrip receipts, the defendant pleaded that before and at the said time, when, &c., he was possessed of the same receipts, and being so possessed, before the same time, when, &c., delivered them to J. D., to be kept by him for the defendants' use, that J. D., before the said time, when, &c., delivered them to the plaintiff, who lost them out of his possession, and they came to the possession of the defendants, that defendants refused, at the request of the plaintiff, to deliver them to him as they lawfully might, quæ est eadem.

Held, bad for duplicity, and for not confessing the conversion complained of. *Acraman v. Cooper and Others*, 495

2. To a declaration on four bills of exchange drawn by the plaintiff and accepted by the defendant: Plea, that before the accruing of the causes of action, on the 30th of October, 1809, a commission of bankruptcy had issued against the plaintiff, that proceeding had been had thereon, that the plaintiff obtained his certificate on the 5th of December, 1810, but that his estate had not paid 15*s.* in the pound; that on the 31st of October, 1817, the plaintiff had petitioned the Insolvent Court, and that on the 17th of December, in the same year, he had been adjudged to be entitled to the benefit of the Insolvent Act, but that his estate had not paid 15*s.* in the pound: that on the 10th of November, 1821, a commission of bankruptcy had issued against the plaintiff, that he obtained his certificate of conformity on the 26th of March, 1822, but that his estate had not produced 15*s.* in the pound; that on the 23rd of February, 1824, a commission of bankruptcy had issued against the plaintiff, under which he obtained his certificate on the 19th of April, 1824, and that his estate had not produced 15*s.* in the pound; that on the 19th of December, 1836, a fiat in bankruptcy had issued against the plaintiff, and that he finished his examination on the 20th of April, 1837, but that his estate had not produced 15*s.* in the pound; and that on the 26th of July, 1837, the plaintiff petitioned the Insolvent Court, and was declared to be entitled to the benefit of the Act on the 6th of November, 1837, and that his estate did not produce 15*s.* in the pound: *Held*, upon demurrer, that the plea was double, and therefore bad; and the Court refused to allow the defendant leave to plead several pleas, but gave leave to amend, on payment of costs. *Alexander v. Townley*. 886

claration in ejectment must state positively and not inferentially, the service to have been effected on the tenant in possession. *Doe dem. Dolby v. Hitchcock*, 1

2. Where the notice at the foot of a declaration in ejectment is addressed to all the tenants in possession of distinct parts of the premises, and each tenant is served with a copy addressed to all, there should be only one rule for judgment. *Doe dem. Vorley v. Roe*, 52

3. In ejectment to recover the bed of a canal, service of declaration on the clerk of the Incorporated Canal Company is sufficient for a rule nisi. *Doe dem. Fisher v. Roe*, 225

4. An affidavit in an action of ejectment, intituled, "John Doe on the demise or demises of R. D. N., and W. L. v. E. L., is bad, and a rule to set aside a judgment having been obtained on such an affidavit, the lessor of the plaintiff was held to be entitled to discharge it, but without costs. *Doe dem. Neville and Another v. Lloyd*, 330

5. Where service in ejectment had been effected on the servant of the tenant on the premises, who promised to convey the papers which were left with him to his master, and the premises were subsequently found to be deserted, the Court refused to grant even a rule nisi for indowment against

EJECTMENT.

costs, unless he has entered into the consent rule. *Doe dem. Pratten v. Board*, 526

11. Where upon a motion for judgment against the casual ejector in an action of ejectment, it appeared that at the time of serving the declaration and notice, the name of the tenant in possession was not known, but a person on the premises came forward and said, that he was the tenant, but refused to give his name, and the name of the original lessee was then filled in, and the tenant was served, the Court granted a rule nisi. *Doe dem. Sir R. Fitzwygram v. Roe*, 672

12. Where the premises in question in an action of ejectment were in possession of a charitable association as tenants, the Court granted a rule for judgment against the casual ejector, upon affidavit, disclosing service upon the matron of the institution on the premises, and upon the secretary, and a subsequent acknowledgment by the solicitor to the association of the declaration, and notice having reached his hands. *Doe dem. Fishmongers' Company v. Roe*, 689

13. A sci. fa. issues to revive a judgment in ejectment; though such judgment was obtained against the casual ejector, and so the merits were not tried. *Doe dem. Ramsbottom and Others v. Roe*, 690

14. Where such a writ had issued, and one H. was described therein as tenant of the whole premises, but in the affidavit of service of notice of the writ it was stated that he was tenant of a part only; the Court refused to grant judgment for the non-appearance of that tenant, even in respect of that portion of the premises, of which he was in possession, *Ib.*

15. Where the tenant in possession of the premises in dispute in an action of ejectment, was an attor-

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ney, the Court granted a rule for judgment against the casual ejector, upon an affidavit of the service of the declaration, and notice upon his clerk, who stated himself ready to accept service for his employer. *Doe dem. Bower v. Roe*, 923

ELECTION.

See ISSUE (SEVERAL).

ERROR.

See AMENDMENT, 2.
NEW TRIAL, 2.
OUTLAWRY, 1.

1. *Semble*, that the Court cannot quash a writ of error, though unduly allowed by the officer.

The Court, however, possesses authority over the acts of its own officer, so that if a writ of error be unduly allowed, the Court may interpose to quash such *allowance*.

Since the 11 Geo. 4, and 1 Wm. 4, c. 70, s. 8, a second writ of error does not lie from the Queen's Bench to the Exchequer Chamber, on the same judgment, even though, by such second writ it is proposed to attack a part of the judgment, different from that on which the judgment of the Court of error proceeded on the first argument. *Holmes v. Newlands*, 716

2. To assumpsit on a building agreement, the defendant pleaded non-assumpsit, together with a plea, that before breach, the contract was rescinded by mutual agreement; judgment having been entered on both issues for defendant: *Held*, on error, that there was no inconsistency on the record. *Cooper v. Langdon*, 836

ESCAPE.

See SHERIFF, 7.

ESTOPPEL.

See TRESPASS, 2.

ESTREAT.

See CORONER'S INQUISITION.
RECOGNIZANCE.

EVIDENCE.

See BANKRUPT, 1.

IDENTITY.

NOTICE (TO PRODUCE).

POWER, 1.

RAILWAY COMPANY, 3.

STAMP, 2.

1. In an action against a sheriff for a false return of nulla bona, to which the defence is, that prior writs are in the hands of the sheriff, to an amount sufficient to cover the whole of defendant's goods, the plaintiff may give evidence that the judgments and prior executions are fraudulent and void, without proving that the sheriff was a party to, or had notice of the fraud, and for that purpose, the conduct of the debtor, with respect to previous executions connected with the fraud, is admissible. *Imray v. Magnay*, 531

2. Where a sheriff has seized goods under a writ issued upon a judgment, fraudulent, under 13 Eliz. c. 5, against creditors, and such goods remain in his hands, he is bound to seize and sell them under a subsequent writ founded on a bona fide debt. *Ib.*

EXAMINED COPY.

See STAMP, 2.

EXCEPTIONS.

See LACHES, 2.

EXECUTION.

See COMPANY, (PUBLIC), 2, 6, 7.
SHERIFF, 4.

Semble, that where a party had

obtained a rule absolute for costs the day, and he has procured costs to be taxed, and the Master allocatur to be indorsed on the he may issue execution under 1 & 2 Vict. c. 110, s. 18, for amount of those costs, without fresh rule of Court, specifying distinct terms, what their amount.

The Court, upon an application for such a fresh rule, refused to entertain the motion, and left the party to proceed at his own peril. *H. v. Paterson*,

EXECUTOR.

See ATTORNEY.

TAXATION, 1.

EXCHEQUER.

See CROWN (DEBTOR), 1.

EXTENT.

See SHERIFF, 6.

FALSE IMPRISONMENT

See PLEA, 10.

FEME SOLE.

See BANKRUPT, 3.

A feme sole plaintiff, who marries before final judgment, may sue in execution without making her husband a party to the record by facias, the marriage being only matter of plea in abatement. *Wall Golling*,

FINES AND RECOVERIES

The Court refused to dispense with the concurrence of the husband of a married woman on an application by her under the 91st section of the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74,) to be permitted to convey her interest in a mortgage, although it was stated that

and the applicant were living apart by mutual consent, and that he was in a "very nervous and exciteable state, and that it would be very difficult, if not impossible to procure the execution by him of any deed," until it was sworn that an application had been made to him with that object, and refused. *Re Hester Murphy*, 110

FORCIBLE ENTRY.

See MANDAMUS, 1.

FORFEITURE.

See CORONER'S INQUISITION.

FRAUD.

See EVIDENCE.

PLEAS, (SEVERAL).

FRAUDULENT PREFERENCE.

To trover by the assignees of a bankrupt, against the sheriff, the latter pleaded a judgment recovered, and execution levied by seizure prior to the fiat, and without notice of any act of bankruptcy. The plaintiffs replied, that the judgment and execution were founded on a warrant of attorney given by the bankrupt by way of fraudulent preference. The rejoinder traversed the fraudulent preference, and issue was found for the defendants: *Held*, that the plaintiffs were entitled to judgment, non obstante veredicto, the record shewing the case to come within section 108 of 6 Geo. 4, c. 16. *Rawdon and Another, Assignees of Woodhouse, a Bankrupt, v. Wentworth, Esq. and Sykes*, 267

FRIVOLOUS DEMURRER.

See DEMURRER, (FRIVOLOUS).

GENERAL ISSUE.

See PLEA, 3, 6, 8, 11.

POWER, 1.

USE AND OCCUPATION.

GUARANTEE.

See SET-OFF, 1.

The plaintiff, (the acceptor of a bill,) sent his son to the defendant, (who represented himself to be the holder,) with directions to pay the amount, and bring back the bill. The son paid the money, but the defendant refused to give up the bill. The plaintiff again sent his son with directions to bring back the bill or the money; the son returned without either. The plaintiff afterwards accepted the guarantee of a third person.

Held, in an action for money had and received, that the guarantee operated by way of accord and satisfaction, and ought to have been specially pleaded. *Alexander v. Strong*, 256

HABEAS CORPUS.

The application for a habeas corpus ad testificandum should be made to a Judge at Chambers, and not to Court. *Browne v. Gisborne*, 963

HABERE FACIAS POSSESSIONEM.

See EJECTMENT, 9.

HUSBAND AND WIFE.

See BANKRUPT, 3.

FEME SOLE.

FINES AND RECOVERIES.

IDENTITY.

A declaration for negligently navigating a vessel, described the defendant as William Henderson, a pilot: At the trial, the plaintiff's

See MANDAMUS, 2.
NOTICE (TO PRODUCE).

INDICTMENT.

See CERTIORARI, 2.

INDORSEE.

See DECLARATION, 3.
PLEA, 5.

INDORSER.

See DECLARATION, 3.
PLEA, 5.

INDORSEMENT, (ON PRO-
CESS).

See CAPIAS AD SATISFACIENDUM,
2.

PAUPER, 4.

SUMMONS, 3, 4.

INDUCEMENT.

See PLEA, 13.

INJUNCTION.

See INTERPLEADER, 1.

ILLEGAL RACE.

INSPECTION OF DOCUMENTS.

Where a devisee of a rent-charge, on certain copyholds was desirous of completing his title, the Court granted a rule absolute in the first instance for the usual limited inspection of the rolls of the manor, although the applicant was not a copyholder. *Ex parte Barnes*, 20

INSURANCE.

See ISSUABLE PLEA.

PLEA, 8.

PLEAS (SEVERAL).

INTEREST.

See ARBITRATION, 4.

INTERPLEADER.

See SHERIFF (RETURN OF).

1. Where a Judge's order has been made for paying a certain sum of money out of Court, to a claimant under an interpleader rule, the Court will not refuse to enforce that order, because there is a creditor's suit pending in equity against the claimant, and an injunction granted, which has not been served on the officers of the Court. *Smith, Administratrix of Smith v. Clinch*, 48

2. The Court will not grant an interpleader rule, where an action has been brought against the holder of a stake deposited with him to abide the event of an illegal race. *Applegarth v. Colley*, 223

3. The assignees of a bankrupt having set up a claim to certain goods in the possession of a carrier, the latter applied to a Judge under the first section of the Interpleader Act, when it was ordered, that unless cause was shewn to the contrary, on a day named, the assignees be barred their claim, and pay the costs. The assignees attended on the day named, when the order was dis-

charged. Subsequently, summonses were served, calling on the plaintiffs and the assignees to state the nature and particulars of their respective claims. The assignees did not attend upon any of these summonses: *Held*, that the Judge had no jurisdiction under the Interpleader Act, to order the assignees to pay costs. *Grazebrook and Another v. Pickford and Another*, 248

4. Where an interpleader summons under 1 & 2 Vict. c. 45, has been heard by a Judge at Chambers, the Court has no jurisdiction as to costs. *Burgh v. Schofield*, 261

5. The Court has jurisdiction to review an interpleader order made by a Judge at Chambers, under the 1 & 2 Vict. c. 45, s. 2. *Teggin and Another, Executors, &c., v. Longford*, 467

6. The assignees of a bankrupt having sued a banker for money deposited with him by the bankrupt, a third party claimed the money as part of a fund which the bankrupt held in trust. On an interpleader rule, the Court ordered an action to be brought in the name of the bankrupt, against the assignees, the cestui que trust to find security for the defendant's costs. *Frost and Another, Assignees of Slater, a Bankrupt, v. Heywood and Another*, 801

7. The affidavit in support of an interpleader rule, should shew that the application was made before plea pleaded, *Ib.*

8. An interpleader rule called on the parties to appear before the Court "in order that it might exercise its jurisdiction on the adjustment of the several claims:" *Held*, sufficient in terms, *Ib.*

9. Where money is paid into Court to abide the event of an interpleader issue, the application by the successful party to obtain the payment of the money out of Court to him, must be made in the original

action and not in the issue. *Levi v. Coyle*, 932

10. Where a defendant applied to the Court to set aside a warrant of attorney, judgment and execution, on the ground of usury, but the rule was discharged upon an objection that the applicant did not produce a verified copy of the instrument; it was held, that it was incompetent for him to come to the Court a second time, with a like motion upon the same materials, with the addition only of an affidavit, verifying the warrant of attorney, *Ib.*

INTERROGATORIES.

1. Where a defendant in ejectment was in custody on an attachment for non-performance of an award, the prosecutor was ruled to exhibit interrogatories: he did so, and they were filed; but not ruling the defendant to appear before the examiners, the Court discharged the defendant on bail. *Doe dem. Clarke v. Stillwell*, 18

2. In an information at the suit of the Crown, the Court will grant a rule for a mandamus to examine witnesses in India, upon the statement of her Majesty's Attorney General, that the writ is necessary, and will not require the production of any affidavit in support of that statement. *Regina v. Douglas*, 416

IRREGULARITY.

See AMENDMENT, 1.

CAPIAS AD SATISFACIENDUM, 1.
COMPANY (PUBLIC), 6.
NULLITY.

ISSUE (JOINING).

To debt by drawer against acceptor of a bill of exchange, the defendant pleaded a set-off. The plaintiff replied that the causes of set-off did not accrue within six years before the commencement of the suit on-

cluding to the country: The defendant added the similiter.

Held, after verdict for plaintiff that there was no definite issue joined. *Spong v. Wright*, 5

ISSUABLE PLEA.

See WAIVER, 1.

To assumpsit for premiums insurance, money paid, and money due on an account stated, the defendant being under terms of pleading issuably, pleaded a set-off of 1,500 for a total loss on a policy of assurance for freight. The plaintiff having signed judgment on the ground that the plea was non-issuable, the Court set aside the judgment without costs.

Quere, whether unliquidated losses on a policy of assurance can be made the subject of a set-off. *Thomson, Public Officer of the Foreign Marine Insurance Company v. Reman*, 10

ISSUABLY (PLEADING).

See AFFIDAVIT, 4.

ISSUES (SEVERAL).

The plaintiff has the option (subject to the discretion of the Court,) of determining whether the issues in law or in fact shall be first decided. *Crucknell v. Trueman and Another*, 27

JUDGE, (CERTIFICATE OF)

See SPECIAL JURY.

1. In an action of trespass for assault and false imprisonment, appeared that the plaintiff was constable, and the defendant a superintendant in the Metropolitan Police Force, and that the cause of action was the detention of the plaintiff in custody, for refusing to give up his police uniform, contrary to the police regulations; the plaintiff having o-

tained a verdict, it was held, that the case did not fall within the operation of the 41st section of the 10 Geo. 4, c. 44, which provides that in an action brought for anything done in execution of that act, no plaintiff shall recover costs, unless he obtains the certificate of the Judge who tries the cause, and that the plaintiff was entitled to his costs, without such certificate. *Bartholomew v. Carter*, 111

2. A certificate in order to entitle the plaintiff to costs, under the statute 3 & 4 Vict. c. 24, that an action was "really brought to try a right, besides the mere right to recover damages," is valid, although it be not applied for until one of the jurors in another cause has been sworn, and although it be not actually given until the whole of them are sworn. *Nelmes v. Hedges and Others*, 350

JUDGE, (NOTES OF).

See AMENDMENT, 3.

JUDGE, (ORDER OF).

See ARREST, 2.

INTERPLEADER, 4, 5.

JUDGES, (ORDER OF).

See ARREST, (DISCHARGE FROM), 1, 2.

1. The plaintiff declared in assumpsit, and the declaration contained four counts; the defendant pleaded non-assumpsit to the last three counts, and to the first count delivered a special demurrer; the defendant having eventually obtained judgment on the demurrer, an order was granted to him, that he should be at liberty to add pleas of payment and set-off; the pleas were delivered, but bore no date, and were not signed by counsel; the plaintiff thereupon signed interlocutory judgment for want of a plea, and delivered a no-

tice of inquiry of damages: *Held*, that such judgment was irregular, for that even supposing the two pleas of payment and set-off to have been nullities, the unobjectionable plea of the general issue still remained untied upon the record.

A Judge's order for setting aside a judgment signed by the plaintiff for want of a plea, was obtained on the 14th of July, (in Vacation,) and by the order it was directed, that the costs of the application should be paid by the plaintiff; on the 16th of July, the costs were taxed, and the Master's allocatur indorsed on the order; on the same day, a rule was drawn up, as of Trinity Term, 5 Vict., but dated the 16th of July, which recited, in terms, the Judge's order of the 14th, and made that order a rule of Court, and further directed, that the plaintiff should pay the costs of the application for that rule. The costs of the rule were taxed on the 18th of July, and on the same day the defendant issued a writ of fi. fa., to levy 9*l.* 6*s.* 8*d.*, being the amount of costs taxed on the Judge's order, and also on the rule of Court, such writ being in the form, No. 8, directed by the Reg. Gen., H. T., 2 Vict., to be used on an order of Court for the payment of money: *Held*, first, that the rule was regular, in making the Judge's order a rule of Court, as of T. T., although such order was dated and granted in Vacation; and, secondly, that the writ of fi. fa., issued on such rule, was invalid, and that the form of writ which should have been adopted, was No. 9, Reg. Gen., H. T., 2 Vict., described to be a writ of fi. fa. on an order of Court, for the payment of money and costs; for that the costs of making the Judge's order a rule of Court, were not yet ascertained at the time of making such rule, and that those costs should therefore have been distinguished from the previous costs

JUDGE, (POWER OF).

See AMENDMENT, 3.

JUDGMENT.

See PAUPER, 3.

1. In a Middlesex cause, the time for pleading expired on the 30th of May; on that day the defendant obtained a rule to change the venue to Surrey, which he served at ten o'clock, on the morning of the 31st, but delivered no plea: the plaintiff signed judgment for want of a plea on the same day: *Held*, that the judgment was signed too soon. *Nichols v. Stockbridge*, 96

2. In an action of debt, the aggregate amount claimed in the declaration, was 1500*l.*; the plaintiff signed judgment by default, and the entry in the Master's book denoted no sum as that for which judgment was entered; a writ of *fi. fa.* having been issued for 514*l.*, the defendant obtained a summons at Chambers, to set aside the writ, on the ground that the judgment must be taken to be for 1500*l.*, and that there was, consequently, a variance; the first summons was not attended, and pending a second summons, the plaintiff made up and carried in the roll. taking indorment for 514*l.* only.

In Town Cases.—Issue joined in, or in Vacation, before any Term, a motion for judgment as in case of a nonsuit, may be made in the second Term next after. Thus, issue joined in, or in Vacation before Hilary Term, motion may be made in Trinity Term.

In Country Causes.—Issue joined in, or in Vacation, before an issuable Term.

Motion after lapse of two Assizes.

Issue joined in, or in Vacation, before a non-issuable Term.

Motion after a lapse of one Assize.
Judgment (as in case of a Nonsuit),
326

1. Judgment as in case of a nonsuit may be moved for in a town cause, where issue is joined in, or in the Vacation before, a Term, in the second Term next after, namely, the third Term inclusive; in a country cause, issue being joined in, or in the Vacation before, an issuable Term, the motion may be made after the lapse of two Assizes; issue being joined in, or in the Vacation before, a non-issuable Term, the motion may be made after the lapse of one assize. *Ellis v. Stebbing,* 118

2. Where in answer to a rule for judgment as in case of a nonsuit in a country cause, it was sworn by way of excuse, by the clerk to the London agent of the plaintiff's attorney, that he had "been informed, and verily believed that the plaintiff was not prepared with sufficient evidence to go to trial;" the Court discharged the rule upon a peremptory undertaking. *Farmer v. Cross,* 387

3. Where, in answer to a rule for judgment as in case of a nonsuit, affidavits were produced, stating that since issue joined the defendant had applied for relief to the Insolvent Court, and had filed his schedule, in which the plaintiff's debt was admitted; the Court discharged the rule with costs, even though it was not sworn that the plaintiff was not

aware of the defendant's insolvency before the commencement of the suit. *Featherstone v. Bourne,* 389

4. Where, in a country cause, the plaintiff had given notice of trial for the Summer Assizes, and the defendant subsequently applied to him, and expressed a wish to settle the action, and was supplied with the terms upon which the plaintiff would consent to such settlement, and pending the negotiation, the time in which the cause could be tried passed over, and the defendant subsequently obtained a rule for judgment as in case of a nonsuit, the Court discharged such rule with costs, as having been obtained against good faith. *Fosbery v. Butler and Lawrence,* 390

5. Where issue was joined with three only of four defendants, and the other had obtained his discharge under the Insolvent Debtors' Act, since the commencement of the suit: *Held,* that there could be no rule for judgment as in case of a nonsuit. *Jackson v. Utting and Four Others,* 543

6. The time for moving for judgment as in case of a nonsuit is the same, whether the trial is to take place before the sheriff, or at Nisi Prius. *Harrison v. Jones,* 798

7. Where the affidavit in support of a motion for judgment as in case of a nonsuit, did not disclose whether the cause was of town or country origin, and if it were a country cause, the motion would have been too soon, the Court discharged the rule.

Held, also, that the motion could not be subsequently renewed upon amended affidavits after being so disposed of. *Withers v. Spooner,* 884

8. Where, in answer to a rule for judgment as in case of a nonsuit, it appeared that notice of trial had been given, and that before the day of trial, the wife of the defendant, who was living separate from her husband, settled the action, but that the de-

defendant received no formal notice of the abandonment of the action, although in a private conversation the plaintiff mentioned such settlement to the defendant; the Court discharged the rule only upon a stet processus, or peremptory undertaking being given, and on payment of the costs of the day. *Wortley v. Gedge*, 937

9. Where issue was joined on the 20th of July, and on the same day notice of trial was given for the ensuing Assizes; but on the 25th, the plaintiff countermanded such notice; upon a motion for judgment as in case of a nonsuit, the plaintiff swore that the defendant was insolvent, and that he was not aware of his insolvency at the time of issue being joined; and it was held, that the defendant was entitled to a peremptory undertaking, or to make his rule absolute, the plaintiff having allowed proceedings in the cause to go on, after he had become acquainted with the fact of the defendant's insolvency. *Aitcheson v. Marsh*, 943

JUDICIAL NOTICE.

See *NEW TRIAL*, 5.

JURAT.

See *AFFIDAVIT*, 1, 2, 5.

A jurat to a joint affidavit of two deponents, "Sworn before me, C. C.," is insufficient. *Lackington v. Atherton*, 904

JURISDICTION (OF COURT).

See *CHANGING STOCK*, 1.
CROWN (DEBTOR), 2.
ERROR, 1.
INTERPLEADER, 4, 5.
RELEASE.
SHERIFF, 3, 8.

LACHES.

JURY.

See *AMENDMENT*, 2.
NEW TRIAL, 3, 7.
WAIVER, 2.

A challenge to the array or polls should be entered at time on the nisi prius record together with the grounds of *The Mayor, Aldermen, and Burgessess of the Borough of Carmarthen v. Evans and Others*,

LACHES.

See *AMENDMENT*, 2, 3.

CAPIAS AD SATISFACIENDUM CONVICTION, 2.
MANDAMUS, 8.
WARRANT (OF ATTORNEY),
WARRANT (OF JUSTICES), 4

1. Where judgment was irregularly signed, and execution levied the 9th of March, it was held late to apply to set aside the judgment on the 28th of April following either at the instance of the defendant himself, or of his assignees, having subsequently become bankrupt, although the latter were aware, until the 7th of April, of irregularity existing in the judgment. *Weedon v. Garcia*,

2. An information having been tried at the Summer Assizes, the defendant tendered a bill of exceptions to the learned Judge, and the day after the trial, supplied him with a sketch of the exceptions: the 3rd of November, the defendant furnished the prosecutor with a draft of the bill of exceptions for his approval; on the 5th of November, the draft being still in the hands of the prosecutor, the defendant moved a rule to restrain the prosecutor from proceeding on his judgment, until one week after the bill of exceptions had been sealed; on the 7th of November (the fifth day of Term), the prosecutor signed judgment: *He* that the defendant had been su

ciently prompt in his proceedings, and that he was entitled to a reasonable time to seal his bill of exceptions and to sue out a writ of error, and the Court refused to compel him to pay the costs of the application, but directed them to be costs in the cause; or to impose a term upon him to enter the fact upon record, that the bill of exceptions was sealed after judgment signed. *Regina v. Rowley*, 335

3. The rule of Court of H. T., 2 Wm. 4, r. 33, which provides, that no application to set aside process or proceedings, on the ground of irregularity, shall be allowed, unless made within a reasonable time, applies as strongly to the cases of prisoners, as of other persons. *Claridge v. McKenzie*, 898

LANDLORD AND TENANT.

A tenant holding from quarter to quarter, subject to a determination of the tenancy, by three months' notice to quit, cannot be compelled to enter into the recognizance prescribed by the 1 Geo. 4, c. 87, s. 1. *Doe dem. Carter and Others v. Roe*, 449

LAST DAY OF TERM.

See PRECEDENCE OF MOTION.

LEGACY.

See NOTICE TO PRODUCE.

LEGITIMACY.

See VAGRANT.

LESSOR AND LESSEE.

See DAMAGES.

LIBEL.

See PLEA, 13.

LIEN.

See PLEA, 3.

LIMITATIONS (STATUTE OF).

See ISSUE (JOINING).

1. To a plea of the Statute of Limitations, the plaintiff replied that a writ issued under the 2 Wm. 4, c. 39, s. 10, and alleged that the writ was returned "by Henry Weeks and William Gilbertson:" *Held*, no ground of special demurrer. *Williams, Executor of Williams v. Williams*, 209

2. Every writ issued under the 2 Wm. 4, c. 39, s. 10, in continuation of a preceding writ, should contain a memorandum, not only of the date, but also of the return of that writ, *Ib.*

3. *Quere*, whether a replication of writs having issued under the above statute, should conclude with a verification by the record, or refer to it, *Ib.*

4. The Court allowed the memorandum and appearance required by the 2 Wm. 4, c. 39, s. 10, to prevent the operation of the Statute of Limitations to be amended, and the roll made conformable to it, after an amendment on demurrer to a replication to a plea of the Statute of Limitations. *Williams, Executor, &c., v. Williams*, 509

LOAN COMMISSIONERS.

See CROWN (DEBTOR), 1.

MAGISTRATE.

See CRIMINAL INFORMATION.
MANDAMUS, 1, 2, 4.

MANDAMUS.

See CONVICTION.

INTERROGATORIES, 2.
WARRANT (OF JUSTICES).

1. The Court refused to grant a

Hampton Court Palace, and that the officers of the Crown claimed that the property was exempt from the operation of such warrants, and threatened proceedings if they were executed, the Court nevertheless granted the writ, and refused to call upon the applicant parish to give the magistrates an indemnity against the consequences of any proceedings which might be taken. *Regina v. The Justices of Middlesex*, 385

3. Where magistrates have taken the examination of a pauper brought before them with a view to an order of removal being made, but have refused to make such order, on the ground of the examination disclosing a settlement in the applicant parish, the Court will not, on a suggestion that the refusal is founded upon erroneous grounds, grant a writ of mandamus to the justices, to compel them to make such order. *Regina v. Edward Rogers, Esq. and Others, Justices of the City of Radnor*, 673

4. Where the examination of a pauper, on which it was sought to found a settlement by apprenticeship, stated, in terms, that the pauper, when about sixteen years of age, "was put out and bound apprentice by the churchwardens and overseers of the poor of W., &c., to W. T., of the township of D," but contained no further allegation of the residence of

MOTION (NOTICE OF).

was obtained, which was made absolute on the 17th of April, 1842, and a return was made on the 14th of May following, and the prosecutor took no further steps down to the following November, and then, upon application, refused to pay the costs of the proceedings, the Court granted a rule, and in the following Easter Term made it absolute, requiring him to pay the costs of the writ, unless by the first day of the following Term he proceeded to traverse or impeach the return which had been made. *Regina v. The Mayor, &c. of Dartmouth*, 980

9. Where upon the hearing of an appeal at Sessions, upon an order of removal, the appellant parish admitted the insufficiency of the grounds of appeal stated in his notice, but applied for an adjournment to deliver fresh grounds, and offered to pay the costs of the day, but the magistrates refused to direct such adjournment, and confirmed the order; it was held, that this Court would not interpose to order continuances to be entered, and the appeal to be heard on its merits. *Regina v. The Justices of Staffordshire*, 353

MARSHAL.

See SMALL DEBTOR.

MEMBER OF PARLIAMENT.

See DISTINGUAS, 1.

MEMORIAL.

See ANNUITY DEED.
COMPANY (PUBLIC), 4, 5.

MINES.

See COSTS, 1.

MOTION (NOTICE OF).

See NOTICE (OF MOTION).

NEW TRIAL.

1105

MIS-TRIAL.

See AMENDMENT, 2.

MISPRISION.

See AMENDMENT, 2

NEW ASSIGNMENT.

See ACCOUNT STATED.

The plaintiff declared in debt for 19*l.* 18*s.* 6*d.*, interest due on a promissory note; the plaintiff pleaded payment as to all, except 7*l.* 9*s.*, and as to that sum payment into Court; the plaintiff's particulars of demand claimed 19*l.* 18*s.* 6*d.*; at the trial, the plaintiff proved that the whole sum which had accrued due on the note, since it had arrived at maturity, was 75*l.*; the defendant proved payment to the amount of 62*l.*; the jury deducting 7*l.* 9*s.* (which was paid into Court), from the residue, 13*l.*, gave a verdict for the plaintiff 5*l.* 11*s.*: the Court held that the verdict was right, and that notwithstanding the defendant's plea of payment, the plaintiff was not bound to new assign and shew that it was for a sum beyond that already paid, that he brought his action. *Kenningham v. Alison*, 658

NEW TRIAL.

See INSOLVENT.

1. Where, after a trial of a cause had in Term, a party seeks to obtain a new trial, his motion must be made within four days of the return day of the distingas, inclusive of the return day: So where a cause had been tried on Thursday, the 26th of May, and the distingas was returnable on the 27th, a motion on the following Wednesday, the 1st of June, was held to be too late. *Chapman v. Eley*, 93

2. A cause being at issue, notice of trial was given for the adjourned Sittings in London, which commenced on the 14th of February: on

Saturday, the 19th of February, the parties attended a summons before a Judge, who made an order that the defendant should be allowed to amend his pleas on condition that the plaintiff should be at liberty, *absolutely*, to go to trial on the following Monday, the 21st of February: the cause was tried on the 22nd of February, and the plaintiff recovered a verdict. After the jury were sworn the defendant objected to the record for irregularity, in the omission of the dates of the teste and return of the venire and habeas corpora, and for an informality in the award of venire, but the objections being overruled, he subsequently obtained a writ of error upon the same grounds of objection: *Held*, upon motion to set aside the trial and verdict; first, that the application was against good faith; secondly, that the defendant had waived the objection, by suing out the writ of error; and upon cross motion by the plaintiff for leave to amend the record; held also, that such amendment might be made, the objections being against good faith. (*Duckterlony v. Gibson*, 101)

3. The circumstance of two of the jury having, on an adjournment of the trial, before they were charged, dined and slept at the house of the party in whose favour a verdict was ultimately found, does not vitiate the verdict. In such a case, it is discretionary with the Court to set aside the verdict, and they will not do so, unless there is some imputation of unfair conduct. *Sir John Morris, Bart., v. Vician and Another*, 235

4. An affidavit in support of a rule nisi for a new trial, must be sworn within the first four days of Term, although the Court are not able to hear the motion until after that Term. *Williams v. Mortimer*, 509

5. On a motion for a new trial in a cause tried before an undersheriff, wherein a Judge had granted the usual order for a stay of proceed-

ings, the rule being drawn up reading such order, it was held the order need not be verified by affidavit. *Davis v. Parsons*,

6. In an action for work and labour, the partner of the plaintiff an admissible witness on the part of the defendant, to prove his partnership,

7. Though the verdict in an action has been found for the defendant, the Court has the power to grant a new trial, if they are satisfied that such verdict is in contravention of the law, whether the error has arisen from the misdirection of the Judge or from a misapprehension of the facts by the jury, or from a desire on the part of the jury to take the exposure of the law into their own hands. *Attorney General v. Rogers*,

NE-RECIPIATUR.

See NOTICE (OF TRIAL).

NEXT OF KIN.

See WITNESS, 2.

NOLLE PROSEQUI.

The defendant having pleaded several pleas, to some of which the plaintiff demurred, and on a joined issue, the demurrers were overruled, and judgment given for the defendant. The plaintiff not having succeeded to trial of the issues in the defendant obtained a rule for judgment as in case of a non-verdict, and on shewing cause, the plaintiff offered a stet processus; at the suggestion of the Court, a nolle prosequi was entered to so much of the declaration as applied to the issues in the defendant waiving his right to costs upon such nolle prosequi.

Semble, that a stet processus need not be entered to part of a declaration. *Quarrington v. Arthur*,

NON EST FACTUM.

See DEMURRER (FRIVOLOUS),

NON OBSTANTE VEREDICTO.

See REFLEADER.

NONSUIT.

See PAUPER, 3.

NOT GUILTY.

See PLEA, 6, 13.

NOT POSSESSED.

See BANKRUPT, 2.
COSTS, 1.
PLEA, 6.

NOTES (OF JUDGE).

See AMENDMENT, 3.

NOTICE.

Notice of an act of bankruptcy given to the sheriff or his officer in possession, is not a notice to the execution creditor.

Semble, that a general notice to an execution creditor, that the defendant has committed an act of bankruptcy, is sufficient, without particularly specifying it. *Ramsey and Others, Assignees of Boden, a Bankrupt*, v. *Eaton*, 219

NOTICE (OF ACTION).

1. An Act for improving the town of Stalybridge, empowered commissioners to appoint constables for executing all such warrants as a justice of the peace should direct to be executed within the town, and the act required notice of action "for anything done in pursuance of it."

Held, that a constable appointed under the act, and directed by the warrant of a justice to enter a house and seize goods under the 11 Geo. 2, c. 19, was not entitled to notice of action. *Shatwell v. Hall, Lee, Priestly and Broadbent*, 567

2. A notice of action under the 24 Geo. 2, c. 44, s. 1, is not bad, by reason of its being signed by the

plaintiff, or of its being served, not by the attorney, but by his clerk. *Morgan v. Leach and Another*, 522

NOTICE (OF APPEAL).

See CONVICTON, 2, 3.

NOTICE (OF MOTION).

See COSTS, 2.

NOTICE (TO MAGISTRATES).

See CERTIORARI, 4.

NOTICE (TO PRODUCE).

1. A bond of indemnity on which the defendant was sued, was in the possession of W., who held it as attorney for the executrix of the deceased attorney of the obligor.

In the progress of the suit, W. had sent the bond to the defendant's attorney, and a copy had been furnished by him to the plaintiff. On the day after the commission day, being the day before the trial, the defendant's attorney, who resided in London, was served with a notice to produce the bond. At the trial, the bond was in Court, in the possession of W., who refused to produce it, alleging his client's privilege: *Held*, first, that under the circumstances of the case, the notice to produce was sufficient.

Secondly, that the copy furnished to the plaintiff was admissible as secondary evidence, notwithstanding the objection of privilege. *Lloyd, Administrator of Edward Lloyd v. Mostyn*, 476

2. A party who gives a bond of indemnity in respect of the wrongful payment of a legacy, is liable for the costs incurred by the obligee, in defending a suit in equity brought by the legatee, *Ib.*

NOTICE (OF TRIAL).

See WAIVER, 4.

On the 4th of January, the plaintiff

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gave notice of trial for the first Sit-tings in Term, which commenced on the 12th of January; the plaintiff not having entered his record, on the 11th of January the defendant entered a ne recipiatur under the Reg. Gen., H. T., 12 & 13 Car. 2, r. 2; on the 14th of January, the plaintiff gave a notice of trial by continuance for the 17th, when the second sittings commenced, and at such second sittings the cause was tried in the absence of the defendant, and the plaintiff obtained a verdict: *Semble*, that the entry of the ne recipiatur by the defendant under the circumstances was not a hindrance of the plaintiff in the trial of his cause, within the Reg. Gen., M. T., 4 Anne; for that until the record was carried in and entered, the plaintiff was not ready for trial: *Held*, that such second notice of trial, by continuance was an insufficient and invalid notice, within the meaning of the same rule and that the trial and verdict were irregular, and must be set aside; for that after the entry of a ne recipiatur, the plaintiff must give a fresh notice of trial to a new and not an adjourned sittings, and cannot, therefore, give notice of trial by continuance. *Fitch and Wife v. Burton*, 958

NOTICE TO QUIT.

See COGNIZANCE.

NULLITY.

See WARRANT (OF ATTORNEY), 3.

A defendant who has been served with a writ of summons, after the expiration of four months from its date, should apply to the Court to set it aside, and not treat it as a nullity. *Hemp v. Warren*, 758

NUL TIEL RECORD.

See VARIANCE, 2, 3, 4.

OUTLAWRY.

NUNQUAM INDEBITAT

See SET-OFF, 3.

OATH.

See AFFIDAVIT, 1.

OFFICER, (PUBLIC).

*See PUBLIC COMPANY.
SEVERAL PLEAS.*

OPTION.

See ISSUE, (SEVERAL).

ORDER (OF JUDGE).

*See JUDGE, (ORDER OF).
INTERPLEADER, 4, 5.*

OUTLAWRY.

See DISTINGAS, 1, 4.

1. On an application to set a ca. sa., and subsequent proceed to outlawry, on the ground that writ had been made returnable immediately, in conformity with provisions of the 3 & 4 W. c. 67, s. 2, instead of making returnable on a day certain, with 4 days between the teste and the turn, the Court refused to do the objection on motion, but let party to bring his writ of *Sandford v. Wyatt*,

2. On making a rule absolute setting aside proceedings in outlawry pursuant to the usual application payment of costs, the Court will limit the period within which costs shall be paid. *Benne Gardener*,

3. *Quære*, how far the rule be maintained, which prevents outlaw from appearing in Court any other purpose than to receive his outlawry; and whether he not be permitted to appear to proceedings against himself, although he cannot enforce any demand of his own.

PARTICULARS.

Where a defendant applied to set aside a warrant of attorney, at a time when the plaintiff had already taken proceedings to outlawry, and pending the rule nisi, the outlawry was completed, the defendant was held to be entitled to come in to make his rule absolute. *Byrne v. Manning*, 403

PARENT AND CHILD.

See VAGRANT.

PARISH OFFICER.

See TAXATION, 4.

PARLIAMENT, (MEMBER OF).

See DISTINGUAS, 1.

PARTICULARS.

See EJECTMENT, 6.
PATENT.

1. Where the plaintiff in 1837, commenced his action for work and labour done, &c., and in September of that year delivered his bill of particulars, and the cause did not go to trial until December, 1841, and it was then referred to arbitration; the Court in the following Trinity Term, pending the reference, allowed the plaintiff to deliver an amended bill, containing new charges, extending over the same period with those specified in the first bill, there being no objection raised by the defendant, that he would not have consented to the reference, had the amended bill been delivered before the submission to arbitration. *Blount v. Cook*, 89

2. The Court will not order the delivery of particulars in an action of trespass, upon the mere statement of the defendant, that he does not know the grievances intended to be relied on, but some special grounds for the application must be shewn. *Horlock v. Lediard*, 277

3. A declaration contained two

PATENT.

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counts on two promissory notes for 50*l.* each, and also a count on an account stated. The particulars of demand stated that the plaintiff sought to recover 50*l.*, the amount of the note in the first count, and 50*l.* the amount of the note in the second count, for the recovery whereof he would avail himself of the whole or any part of the declaration. No evidence was given in respect of the promissory notes: *Held*, that under the above particulars, an admission by the defendant that he owed the plaintiff 100*l.*, could not be given in evidence in support of the account stated. *Roberts v. Elsworth*, 456

4. In an action by a servant for his wrongful discharge, the declaration contained a special count, and a count for work and labour, the defendant pleaded non assumpsit, and that he discharged the plaintiff for misconduct. The particulars of demand stated that the plaintiff, besides seeking to recover damages under the special count, sought to recover under the indebitatus counts, 37*l.* for one *quarter's* work. The jury found that the defendant was justified in dismissing the plaintiff, and that he was entitled to a *month's* wages; *Held*, that he was not precluded by the particular from recovering it. *Hurcum v. Steriker and Another*, 524

PARTNER.

See NEW TRIAL, 6.

PATENT.

In an action for the infringement of a patent, the defendant pleaded that the nature of the invention, and the manner in which it was to be performed, were not particularly described in the specification, and also that the supposed invention was not new. The notice of objections de-

livered with the pleas in pursuance of the 5 & 6 Wm. 4, c. 83, s. 5, stated that the specification did not sufficiently describe the nature of the invention, and the manner in which it was to be performed, and also that the invention was not new, and was wholly or in part used and made public before obtaining the letters patent.

Held, that the first objection was sufficiently stated, but that the second should have pointed out the parts of the invention, which were alleged to have been previously in use. *Heath v. Unwin*, 482

PAUPER.

1. A pauper is exempt from the payment of interlocutory as well as final costs, except in cases within 1 Reg. Gen., H. T., 2 Wm. 4, s. 110, for not proceeding to trial pursuant to notice. *Pratt v. Delarue*, 322

2. A plaintiff being admitted to sue in formâ pauperis after the commencement of the suit, the order for such admission has not a retrospective effect, but the plaintiff is liable for costs precedently incurred. *Pitcher v. Roberts*, 394

3. The 1 & 2 Vict. c. 110, s. 17, allowing interest on judgments ap-

ground, it appeared that the defendant had not tendered or paid the principal amount, and not such poundage and fees, the Court discharged the rule, but without costs.

Ib.

5. A person may be admitted to sue in formâ pauperis, at any time during the progress of a suit, but in such case, if the defendant succeed in the action, the plaintiff must pay the defendant's costs up to the time of the plaintiff's admission so to sue. *Doe dem. Allis v. Owens*, 426

PAUPER, (EXAMINATION OF)

See MANDAMUS, 3.

PAWNBROKER.

See PLEA, 14.

PAYMENT.

See PLEA, 7.

PEER.

See DISTINGAS, 4.

PLEA.

See ABATEMENT.

2. In assumpsit for goods sold and delivered, a plea of 29 Car. 2, c. 3, s. 17, is bad, as an argumentative denial of the facts alleged in the declaration. *Leaf and Another v. Tuton*, 300

3. Declaration on a promise by defendants to pay 250*l.* on the plaintiff's delivering up certain goods, to wit, two thousand hats, on which he had a lien, and alleging that the plaintiff was willing, and tendered and offered to deliver up the hats, and to abandon his lien, but defendant refused to accept them: Plea, that the tender was of two closed casks, which the plaintiff represented as containing the hats, and that the defendants never had an opportunity of inspecting the same, although they requested the plaintiff to allow them to open the casks, and examine the contents, which he refused.

Held, bad, as being an argumentative denial of the tender. *Isherwood v. Whitmore and Others, Assignees of Jarrett, a Bankrupt*, 548

4. The declaration alleged, that in consideration, &c., the defendants had undertaken and promised the plaintiffs to deliver certain goods of the plaintiffs at the port of Canton, all and every dangers and accidents of the seas and navigation of whatever nature or kind soever excepted, unto certain persons, to wit, Messrs. E. and Co.; that the defendants had and received the said goods on board their ship, but disregarding their promise, did not, nor would deliver or cause to be delivered, the said goods at the port of Canton, &c., although not prevented, &c., but on the contrary, &c. Plea, that after &c., the ship of the defendants proceeded on its voyage to Canton, and within a reasonable time, the said ship, with the plaintiffs' goods on board, arrived near to the said port of Canton, to wit, on the high seas there adjacent, and that afterwards,

certain persons, then being officers of our Lady the Queen, duly authorized in that behalf, and then exercising the power of her Majesty's government there, to wit, one C. E., then being chief superintendent of the trade of her Majesty's subjects to and from the dominions of the Emperor of China, according to the statute, (3 & 4 Wm. 4, c. 93, ss. 5 & 6,) and one S., then being captain of H. M. S. Volage, and then being the commanding officer of her said Majesty's naval forces there, did, for divers good and sufficient, and lawful causes and reasons, then and in that behalf moving, &c., forcibly interrupt the said ship from further proceeding on its said voyage to Canton, and did prohibit, prevent, and discharge the said ship from proceeding to Canton aforesaid, and did, by virtue of the powers and authority to them, in that behalf committed, and by means of her said Majesty's naval forces, and by the force and duress thereof, forcibly constrain and compel the said ship, and from thence continually have constrained and compelled the same not to proceed to Canton aforesaid, and thereby prevented, and thenceforth, &c., the said defendants from delivering the said goods at Canton aforesaid.

Held, on special demurrer, that the plea was bad, for that it did not sufficiently disclose the lawful authority of C. E. and S., as the chief superintendent of trade, and as commander of her Majesty's naval forces, to prohibit or prevent the defendants' ship from proceeding to Canton; and that although by section 5 of the 3 & 4 Wm. 4, c. 93, the king is authorized to appoint superintendents of trade in China, and by section 6, his Majesty in council may issue orders and commissions to give to the superintendents powers over, and in respect of the trade of British subjects, within any part of the Chinese dominions, yet that the exercise

the commencement of the suit to wit. on &c., the plaintiff, *for and on account* of 150*l.*, parcel. &c., and the said promises of the defendants, and T. M., in respect thereof, made his bill of exchange, and directed the same to T. M., and thereby required him to pay to the plaintiff's order, three months after date, the said sum of 150*l.*, and the said T. M., and on account of the said sum of 150*l.*, parcel, &c., and the said promises of him, the said T. M., and the defendants, in respect thereof, then accepted the same bill, and delivered the same to the plaintiff, who took and received the same, for and on account of the said sum of 150*l.*, parcel. &c., and the said promises, &c. Demurrer, for that it did not appear that the bill was not due before the commencement of the suit; or that the plaintiff had ever indorsed or transferred the same to any third person; or that the bill was not still unpaid in the hands of the plaintiff as holder; and for that the delivery of the bill by T. M., did not affect or take away the plaintiff's remedy against the defendants.

Held, that the demurrer was ill, for that the defendants could not know, nor could they prove the facts, whether the plaintiff had or had not transferred the bill; but the Court allowed the plaintiff to amend, by replying, on payment of costs. *Mercer v. Cheese and Others*, 619

would become assurers to the plaintiff of the said sum of 2000*l.*; that the plaintiff was, during the voyage, interested in the goods, and that the assurance was made for his use and benefit, and on his account, and that the goods were damaged by the perils of the sea during the voyage. The defendants pleaded, secondly, that the policy was not caused to be made by or on behalf of the plaintiff, *modo et forma*: Thirdly, that the plaintiff did not pay the premium, or promise the defendants to observe the terms of the policy: Eighthly, that the goods were damaged before the plaintiff had any interest in them.

Held, that the second and third pleas were bad, as amounting to the general issue.

Held also, that the declaration was good, and the eighth plea bad, and that if the defence intended was, that the plaintiff purchased the goods when damaged, the proper form of plea would have been to traverse the loss by perils of the sea. *Sutherland v. Pratt and Others*, 813

9. A declaration in assumpsit stated the defendant to be indebted to the plaintiff in 100*l.*, for work and labour, and in 100*l.* for money due on an account stated. Plea, as to 10*l.*, parcel, &c., a tender of that sum: Replication, that a larger sum than 10*l.*, to wit, 31*l.*, being part of the money in the declaration mentioned, including the 10*l.*, was due on account of one and the same causes of action in the declaration mentioned; that the plaintiff demanded the said sum of 31*l.*, and defendant refused to pay it.

Held, bad, on special demurrer.

Semble, that where a sum is due on an entire contract, and the defendant pleads a tender of a smaller amount: the plaintiff may reply that a larger sum was due, in respect of that entire contract. *Hesketh v. Fawcett*,

827

10. To a declaration in trespass for assault and false imprisonment, the defendant pleaded, that the plaintiff with force and arms came to the door of the dwelling-house of the plaintiff, and did with great force and violence, attempt and endeavour forcibly to enter the said dwelling-house, and there, with great force and violence, wilfully and wantonly rang the door-bell, then having no lawful occasion to go into the said dwelling-house, and then made a great noise and disturbance before and at the door of the said dwelling-house, to the great annoyance of the defendant, and against the peace of our Lady the Queen, whereupon the defendant, in order to preserve the peace, gave charge of the plaintiff to a certain policeman: *Held*, on demurrer, that the plea was bad, for that it contained no sufficient allegation of a breach of the peace having been committed, nor any statement that a breach of the peace was anticipated or apprehended. *Grant v. Moser*, 923

11. A declaration stated an agreement that the plaintiff should sell, and the defendant buy a messuage, &c., and before the 29th of September, pay for the fixtures, a sum determined by valuation, if made before the 29th of September, if not so made, a reasonable sum. Averment, that no valuation was made: Breach, the non-payment of the reasonable sum. The plea set out the actual contract, by which it was agreed that the plaintiff "on receiving the reasonable value of the fixtures would execute an assignment of a lease of the messuage, and upon the execution of such assignment and payment as aforesaid, the defendant should be put in possession of the premises." The plea then alleged, "that the plaintiff did not, nor was he ready and willing to execute the assignment or put the defendant in pos-

taining counts for work done; for money paid, and on an account stated, the defendant pleaded to the first and last counts that the monies in the said first and last counts are claimed by the plaintiff for and in respect of work done, &c. : *Held*, bad on special demurrer, for that the plea did not sufficiently allege the identity of the monies claimed in the two counts, but answering the first count, left the last count unanswered, and that the last count, *prima facie*, raised a separate and distinct cause of action on the part of the plaintiff.

Rayner v. Wright,

418

13. A declaration for libel, stated, that at the time of committing the grievance, the defendant used the words "black sheep," meaning a person of stained and sullied reputation, and that the defendant used the words "black legs," meaning a person guilty of cheating and defrauding; it then stated, that the defendant published of the plaintiff the following libel, "black sheep, (meaning thereby, that the plaintiff was a black sheep, in the sense in which the word was so used as aforesaid,") or "sharps and flats," and then set forth a paragraph which contained nothing in itself libellous. The defendant pleaded as to publication of part of the libel, to wit, "black sheep" that the word was not used in the sense alleged; there was a similar plea to the words

the plea was bad, for that it confessed the meaning imputed to the words spoken, that the plaintiff had been guilty of manslaughter, and afforded no justification for such an allegation.

The second count of the declaration alleged the use of the words "He made up the medicines wrong, through jealousy; because I would not allow him his own judgment;" innuendo, that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines in a wrong and improper manner, and that such medicines were, to his knowledge, unfit and improper: *Held*, that the words as alleged, imputed no criminal offence, and that the count was bad.

The third count alleged the use of the words "Mr. P. told me that he had given my child too much mercury, and poisoned it; otherwise it would have got well." Innuendo, that the plaintiff had, through ignorance or inattention, administered to the said child such an excessive quantity of mercury, that the said mercury had acted as poison, and caused the death of the child: *Plea*, that the plaintiff did wrongfully and improperly, and contrary to his duty, administer to the said child of the defendant, an excessive proportion of mercury, having reference to the state and condition of the said child: *Held*, that the plea neither confessed nor avoided the charge in the declaration, and was therefore bad. *Edsall v. Russell*, 641

16. A declaration stated that the plaintiff, before, and at the time of making the agreement thereafter mentioned, was lawfully possessed for the residue of a term of years, of a dwelling-house, and thereupon, it was agreed that the plaintiff should, on or before the 24th of June, let to the defendant, and that the defendant should become tenant by a lease to be granted by the plaintiff for

twenty-one years, from the 24th of June: *Averment*, that plaintiff had performed all things on his part to be performed, and was on the 24th of June, ready and willing to let to the defendant, yet the defendant would not become tenant: *Pleas*, first, that the plaintiff was not possessed for the residue of the term modo et formâ. Secondly, that plaintiff, at the time of the agreement had not a good title to, and could not, on the 24th of June, let to defendant, or grant a lease for the said term.

Held, on special demurrer, that the pleas were bad; and that the averment of the plaintiff's readiness and willingness to grant a lease was equivalent to an averment of title. *De Medina v. Norman*, 239

PLEA (ISSUABLE).

See WAIVER, 1.

PLEADING (ISSUABLY).

See AFFIDAVIT, 4.

PLEADING (TIME FOR).

See JUDGMENT, 1.

PLEAS (SEVERAL).

See COMPANY (PUBLIC), 3.

To a count on a policy of insurance on a ship and cargo, the Court refused to allow the defendant to plead that the policy was obtained by fraud, together with pleas that the defendant's subscription to the policy was obtained by fraud; that a small portion only of the cargo was put on board as a cloak and pretence, and with the intention of defrauding the underwriters; also that a small portion only of the cargo was loaded on board, with intent that it might appear to constitute a valuable cargo. *Reid and Another v. Rew* 543

POUNDAGE.

See PAUPER, 4.

POWER.

1. In trespass for breaking the outer door, and entering the plaintiff's dwelling-house, the defendant may give in evidence under the general issue, that he had entered by virtue of a warrant of distress for rent, and was turned out of possession, whereupon he committed the trespass complained of. *Eagleton v. Gutteridge*, 1053

2. A power was executed abroad, appointing one — B., attorney. The power was delivered to B., who inserted in the blank space the Christian name "Henry:" *Held*, that the power was not invalidated thereby, *Ib.*

3. Agreement as follows: "I, W. E., do hereby acknowledge that I am indebted to B., as agent of S., my landlord, in the sum of 22*l.*, for arrears of rent for the cottage now in my occupation; and I do now pay the said B. 5*l.* on account and in part of such rent, and do hereby undertake to pay the said B. 8*l.* per annum, by quarterly payments:" *Held*, not to require a lease stamp, *Ib.*

POWER (OF ATTORNEY).

See ATTACHMENT. 1. 2.

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PUBLIC COMPANY.

PROHIBITION.

1. Affidavits in support of an application for a writ of prohibition must be entitled simply in the Court, and not in any cause; therefore, affidavits produced on such a motion, entitled "In the Queen's Bench: Between the Rev. Thomas Bevan Gwyn, clerk, party agent, and Mary Evans, party respondent: In Prohibition," were rejected, there being no such cause in Court. *Ex parte Evans*, 410

2. Where such an objection was raised to affidavits, on shewing cause against a rule granted upon them, the Court refused to allow the affidavits to be re-sworn, but discharged the rule, *Ib.*

3. The Court will grant a prohibition to a spiritual Court to stay proceedings in a suit of defamation, even after sentence, if it appear that that Court has exceeded its jurisdiction.

The onus of establishing such excess of jurisdiction lies upon the applicant party; therefore, where by the sentence in the suit in the Court below, which was a suit for defaming a spiritual person, it was found that the defendant had "maliciously said several words in the libel mentioned," and it appeared that some of the words imputed a temporal offence, the Court left the applicant to declare in prohibition, in order that it might be ascertained whether the sentence had proceeded upon those words. *Ex parte Mary Evans*, 726

PROMISE (ALLEGING).

See DECLARATION, 3.

PROVISIONS UNWHOLESOME (SELLING).

See CERTIORARI, 3.

PUBLIC COMPANY.

See COMPANY (PUBLIC).

RAILWAY COMPANY. 1117

PUBLIC OFFICER.

See PUBLIC COMPANY.
SEVERAL PLEAS.

PUBLIC WORKS.

See CROWN (DEBTOR), 1.

PUIS DARREIN CONTINUANCE.

See COUNTY COURT, 3.
SURPRISE.

To an action for goods sold and delivered, the defendant pleaded puis darrein continuance, that on the 13th of July, 1843, the plaintiffs were bankrupt, and that afterwards an official assignee was appointed, and after the last pleading in the cause, and within eight days now last past, the creditors' assignees were chosen: *Held*, bad, for not shewing that the official assignee was appointed within eight days before plea. *Dunn and Another v. Hill and Another*, 1062

QUARTER SESSIONS.

See BASTARD.
MANDAMUS, 9.

RACE (ILLEGAL).

See INTERPLEADER, 2.

RAILWAY COMPANY.

See MANDAMUS, 5.

1. The 108th section of the 6 & 7 Wm. 4, c. 108, (Thames Haven Dock and Railway Company's Act), provided that the business and concerns of the company should be carried on under the management of twelve directors, to be chosen from amongst the proprietors, holding ten shares each, to whom the general management and control of the business of the company was entrusted, and who were authorized to do all things necessary or expedient for carrying on

qualified in his place : sect. 116 provided, that at all meetings of directors five should be a quorum ; sect. 123 enabled the company to sue for calls.

Where in an action under this act for calls, the defendant suffered judgment by default, and judgment was signed on the 8th of March, and on the 31st of May, in T. T., he applied to set that judgment aside, on the ground that at the time of the commencement of the suit, and during its continuance, the direction consisted of seven proprietors only, instead of twelve ; the Court refused to interfere, as well on the ground of the delay in the defendant's application, as because his objection might have been raised by plea, and argued on demurrer, and because the objection was not clearly made out on the provisions of the act.

Held, also, that the provisions of the 108 and 112th sections of the act were directory only, and that the business of the company might be conducted by seven directors, unless the shareholders should interfere to require the completion of the whole number ; but that, at all events those provisions were intended for the internal management of the company only, and could not be taken advantage of by a person in the position of a stranger. *The Thames Haven Dock and Railway Company*

payable, he transferred his shares to one C. T., and that a memorial of such transfer was duly entered, according to the provisions of the act, and that thereby his liability had ceased. On demurrer to the plea, it was held, that under the provisions above recited, the plea set up a good answer to the action, for that the defendant was not a proprietor *for the time being*, within the meaning of the act. *The Aylesbury Railway Company v. Mount*, 143

3. The act, 6 & 7 Wm. 4, c. cxliii. ["An act for making a Railway from the Minorities to Blackwall, with branches, to be called the Commercial Railway,"] provides by section 11, that it shall be lawful for the company thereby created, to treat for the purchase of such lands, &c., as they shall require for the purpose of the railway, and by sect. 22, provides, that for settling all differences, which may arise between the company, and the owners or occupiers of any lands which shall be taken, damaged, or injuriously affected by the making of the railway, if any such person shall not agree with the company as to the amount of the purchase money or satisfaction, recompense or compensation for tenant's fixtures, goodwill, &c., or if he shall refuse to accept such amount as shall be offered by the company, then, after notice of such non-acceptance, the company shall issue a warrant to the sheriff or sheriffs of the county or city, where the lands in question shall be situate, and if such sheriff or sheriffs, or their under-sheriff or under-sheriffs respectively, shall be a shareholder or shareholders in the said company, or in anywise interested in the matters in question, then to any of the coroners of the said county or city, not interested, commanding such sheriff or other person to empanell a jury, who, upon their oaths, shall inquire of and

assess, and give a verdict for the sum of money, to be paid for the purchase of such lands, and also the sum of money to be paid by way of satisfaction, &c., for goodwill, &c., or for any injury or damage which shall before that time, have been done or sustained; which satisfaction, &c., for such damage, shall be inquired into and assessed separately and distinctly from the value of the lands. The 2 & 3 Vict. c. xcv., s. 22, enacts, that, in all cases of dispute between the company and parties claiming compensation, wherein the company, do not, upon request, submit the matter in dispute to the determination of a jury, then it shall be lawful for the claimant to send a request in writing to the sheriff, &c., according to the tenor of the previous act, which sheriff shall summon and empannell a jury, and proceed in the manner prescribed in the previous act, upon the issuing of the warrant of the company. By section 27 of the former act, it is provided, that where the verdict of a jury shall be given for the same or a greater sum than shall have been previously offered by the company, for the purchase of any lands, or as compensation for any damage or loss sustained in the execution of the act; all the costs, charges, and expenses of the inquisition shall be defrayed by the company, and shall be settled and determined by the sheriff, &c.

In an action of debt, the plaintiff alleged the construction of the railway, and the consequent deterioration in value of his premises; that he gave the necessary notice to the company, but that the company did not treat for the purchase of his interest, nor for the compensation or satisfaction to be made to him for his damages in respect of his goodwill, &c.; that he requested the company to issue a warrant, and submit the matter in dispute to the determi-

(wherein the premises were situate); that the jury were duly empanelled; that the plaintiff and defendants appeared by counsel; that the jury found that the plaintiff's house was deteriorated in value by the construction of the railway, and gave their verdict for 250*l.*, to be paid for the purchase of the plaintiff's interest, and also by way of satisfaction for damage; but that the defendants had refused to pay the said sum of 250*l.* Second count, for the costs of the proceedings taken by the plaintiff. Plea, that T. F., Esq., at the time of the request, and of holding the inquisition, &c., was a shareholder in the company, by means whereof, the inquisition, &c., were void. Second plea, that at the inquisition the plaintiff adduced evidence, not only of damage in respect of goodwill, &c., but also in respect of damage to the dwelling-house, by reason of the construction of the railway, and that the verdict of the jury proceeded in respect of both classes of damage, whereby the inquisition was void.

Held, upon demurrer, first, that in the particular case, the fact of one of the persons constituting the office of sheriff, was immaterial; for, that although, in proceedings taken by the company, under the statute, 6 & 7 Wm. 4. c. 62. s. 11. the

RESIDENCE, &c.

REPLICATION. 1121

REASONABLE TIME.

RESPONDEAT OUSTER.

See CARRIER.

See PLEA, 1.

DECLARATION, 1.

RETURN OF SHERIFF.

RECOGNIZANCE.

See SHERIFF (RETURN OF).
SHERIFF, 11.

A recognizance of bail having been returned into Court for the purpose of being estreated, the Court refused to remit it back to the justices in order that it might be amended. *Ex parte Higgins, In re Regina v. Stack,* 713

REPLEADER.

Judgment non obstante veredicto, can only be awarded on a pleading by defendant in confession and avoidance, therefore, where a replication traverses part of a plea, and leaves a material part unanswered, the Court cannot give judgment, non obstante veredicto, or arrest the judgment, but the proper course is to award a replader.

RELATION.

See BANKRUPT, 2.

RELEASE.

See BANKRUPT, 1.
SURPRISE.

A court of law will not interfere to prevent a party from pleading a release, unless it be made out manifestly and clearly that there has been a fraud by some person upon the plaintiff, and that the defendant is a party to that fraud.

Therefore, in an action for illegally pledging tobacco, the Court refused to set aside a plea of release by one of several parties interested in the tobacco, it not being clear that a Court of Equity would, under the circumstances, set aside the release.

Semble, that a Court of law has no power to set aside a release, but can only prevent its being pleaded. *Lawrence Phillips, Samuel Phillips, and J. E. Larrien v. Claggett,* 1004

To assumpsit by payee against maker of a promissory note, the defendant pleaded, that the plaintiff, by a threat, that he would prevent the funeral of the plaintiff's brother, procured the note from the defendant, and that there never was any consideration for the note. The replication alleged, that the plaintiff did not, by a threat that he would prevent the funeral of the plaintiff's brother, procure the note, *modo et forma*: *Held*, an answer to the whole plea. *Atkinson and Another v. Davies,* 778

REPLICATION.

To an action against the acceptor of a bill of exchange, the defendant pleaded that being indebted to M. he accepted the bill, and delivered it to the drawer for a special purpose: *viz.* that he should get it discounted, and pay the proceeds to M., and that the drawer held the bill for such special purpose, and for the sole use and benefit of the defendant.

RENEWED APPLICATION.

See INTERPLADER, 10.

RESIDENCE (OF DEFENDANT).

See SUMMONS, 2.

Replication, that the drawer did not hold the bill for the said special purpose, and for the sole use and benefit of the defendant: *Held*, on spe-

1122 SECONDARY EVIDENCE.

cial demurrer, that the traverse was not too large. *Eden v. Turtle*, 459

REPLEVIN.

See COGNIZANCE.

Replevin will lie for a distress levied under a warrant of justices. *George v. Chambers, Rees and Others*, 783

RETAINER.

See CORPORATION.

RINGING BELL.

See PLEA, 10.

RULE TO COMPUTE.

See RULE (SERVICE OF).

RULE (SERVICE OF).

1. Service of a rule to compute, by putting the same through the door of the chambers of defendant's attorney, there being a notice on the door to that effect, is sufficient. *Warren v. Thompson*, 224

2. Service of a rule to compute at the dwelling-house of defendant, on a female whom deponent believes to have authority to receive messages for defendant insufficient. *Brandon v. Edmonds*, 225

3. Service of a rule nisi to compute on the daughter of the defendant's landlady of the house, in which the defendant was personally served with notice of declaration is sufficient. *Lawes v. Scales*, 342

SCIRE FACIAS.

See COMPANY (PUBLIC), 2, 5, 6, 7.
EJECTMENT, 13.

FEME SOLE.

VARIANCE, 2.

SECONDARY EVIDENCE.

See STAMP, 2.

In an action on an attested agree-

SERVICE, &c.

ment, it was proved that the attesting witness, some months ago, had embarked on board a vessel bound for America, that a letter had been since received in his handwriting and marked by him "ship letter" and that he had not been seen since the lodge of Odd Fellows, to which he belonged; *Held*, sufficient to rebut secondary evidence. *Davidson v. Carr*,

SECURITY FOR COSTS.

1. Where a plaintiff has been compelled to give security for costs on the ground that he was out of the jurisdiction; on an application to discharge the rule for that security on the ground of the plaintiff's residence in this country, with an intention permanently to reside here, the security is insufficient for the plaintiff's attorney's clerk, to make an affidavit to that effect. *Thrasher v. Bush*

2. Where a plaintiff was residing out of the jurisdiction, the Court discharged a rule for security for costs, on the plaintiff's consent to set-off any costs to which he might become liable in the action, against a judgment obtained by him against the defendant. *Bristowe v. Need*

SERVICE (OF JUDGE'S ORDER).

Service of a Judge's order requiring the payment of costs or the appointment of a country attorney on the attorney, within the meaning of the rule of Court, of the 27th of May, 1840, and its disobedience of the order, within the meaning of such rule, if the defendant does not immediately pay the costs demanded. *Thompson v. Bi*

SERVICE (OF NOTICE)

See CERTIORARI, 4.

SET-OFF.

SERVICE (OF PROCESS).

See APPRENTICE, 1, 2.

SERVICE (OF RULE).

See RULE (SERVICE OF).

SET-OFF.

See ISSUABLE PLEA.

• ISSUE (JOINING).

TENDER.

1. In an action of covenant, the defendant cannot set off a sum alleged to be due on a guarantee under seal, given by the plaintiff to the defendant. *Williams and Wife v. Flight*, 11

2. To a plea of set-off, the plaintiff replied that except as to 97*l.* 12*s.* 4*d.*, parcel, &c., he was not, at the commencement of the suit, and at the time of pleading the plea, indebted, modo et forma, and as to 97*l.* 12*s.* 4*d.*, parcel, &c., that before the pleading of the replication, the plaintiff had paid that sum into Court, in a cross-action brought against him by the defendant, which said sum, the defendant took out of Court, in satisfaction, concluding with a verification.

Held, bad, on special demurrer.

Semble, that where there is a demurrer to two counts on two pleas, one of which is bad, and the other good, the Court should give judgment according to the truth as it appears on the record. *Briscoe v. Hill*, 556

3. Where to a plea of set-off, the plaintiff replies, "that he was not at the time of the commencement of the suit, nor is indebted to the defendant, in manner and form, &c.," he is entitled to give evidence of payment in answer to the proof in support of the plea.

Such evidence, however, would not be admissible under a replication

SHERIFF.

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of nunquam indebitatus to a plea of set-off. *Harvey v. Hoffman*, 683

SETTING OFF COSTS.

See SECURITY FOR COSTS, 2.

SEVERAL PLEAS.

See PLEAS (SEVERAL).

The Court will not allow a party sued as public officer of a banking co-partnership to plead a plea denying that he was public officer at the commencement of the suit, together with other pleas which go to the merits. *Needham v. Law*, 1027

SHAREHOLDER.

See COMPANY (PUBLIC).

RAILWAY COMPANY.

SHERIFF.

See AMENDMENT, 2.

EVIDENCE, 1, 2.

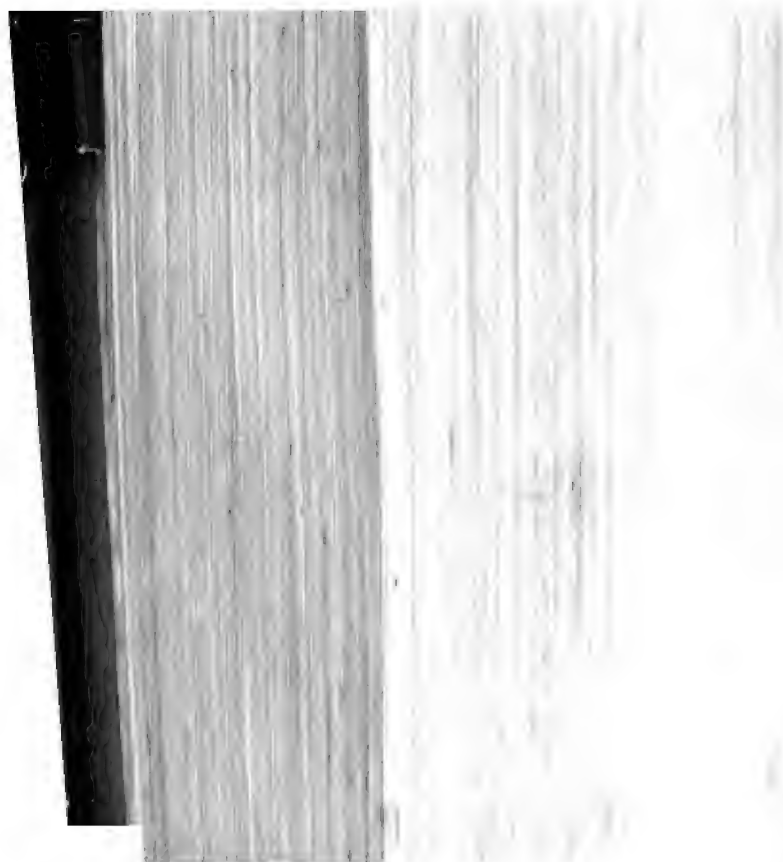
RAILWAY COMPANY, 3.

WRIT OF TRIAL.

1. A sheriff is not liable to an attachment for not returning a writ which has not been transferred to him by his predecessor in office, notwithstanding the provisions of the 3 & 4 Wm. 4, c. 99, s. 7. *Thomas v. Newnam*, 33

2. A sheriff may levy under a fi. fa., the amount of his fees authorized by the 7 Wm. 4, and 1 Vict., c. 55, although not indorsed on the writ, and he need not particularize their respective amounts in his return. *Curtis v. Mayne*, 37

3. The Court will not grant any process or rule against a sheriff's officer, who, having been entrusted to serve a writ of distringas, obtained to compel appearance, to which the sheriff has returned nulla bona, and non est inventus, will not make an affidavit of the efforts which he has



the Court could afford the sheriff no relief for the extra costs incurred in keeping the custody, but enlarged the time for him to make his return.
Jones v. Robinson, 1044

SHERIFF, (RETURN OF).

See SHERIFF, 4, 11.

Upon a writ of fieri facias, the sheriff's return, that he had seized certain goods which were claimed by a third party, and thereupon, he applied to the Court, under the Interpleader Act, and an order was made for the trial of an issue, whether the goods were the property of the claimant; that, afterwards, the plaintiff directed him to deliver up possession of the goods to the claimant: *Held*, insufficient. *Cleaver and Another v. Fisher*, 292

SIMILITER.

See ISSUE (JOINING).

SLANDER.

See PLEA, 14, 15.

SMALL DEBTOR.

A defendant in execution for twelve months for a debt not exceeding 20*l.*, cannot be compelled to accept his discharge under the 48 Geo. 3, c. 123. Therefore, where an application for the discharge of such a defendant was made by the Marshal of the Queen's prison, and cause was shewn against the rule, the motion was dismissed with costs.
Wood v. Heath, 651

SPECIAL CASE.

See COSTS, 4.

SPECIAL COUNT.

1. Where, in an action of debt for goods sold and delivered, the plaintiff declared in the common form, but at

the trial it appeared that a contract had been made between the parties, by which the defendant agreed to pay for the goods supplied, partly in other goods and partly in money, and, there being no evidence offered to shew whether the defendant had or had not delivered to the plaintiff the goods agreed to be taken in exchange, the jury found a verdict for the plaintiff for the amount of the money only; it was held, that it was no objection to the verdict, that the plaintiff had not declared specially on the contract. *Bull v. Parker*, 345

2. Where, in support of a plea of tender, it was proved that an agent of the defendant had gone to the plaintiff, and had offered him 4*l.*, "in full discharge of his account;" and the question of the meaning of these words was not left to the jury, but a verdict was directed to be entered for the plaintiff, it was held, that the tender was sufficient, the plaintiff having offered no objection at the time it was made to its form, and that he was called upon to accept the sum tendered in full discharge, but rejecting it simply on the ground that the money was not enough. *Ib.*

SPECIAL JURY.

The words in the Special Jury Act, 6 Geo. 4, c. 50, s. 34, requiring the Judge's certificate, "immediately after verdict," mean that the Judge shall certify within a reasonable time after it is pronounced. *Christie v. Richardson*, 503

SPECIAL PLEA.

See GUARANTEE.

STAKEHOLDER.

See INTERPLEADER, 2.

STAMP.

See POWER, 3.

WAIVER, 5.

1. On an issue to try the property in certain goods which the plaintiff claimed under a bill of sale, a previous bill of sale of the same goods, though cancelled, is not admissible to prove bona fides, unless stamped.

Williams v. Gerry, 201

2. An examined copy produced as secondary evidence of a deed does not require a stamp. *Braithwaite v. George Hitchcock*, 444

3. T. P., in November, 1840, gave a warrant of attorney to N. P., for 1000*l.*, together with interest for the same, at the rate of 5*l.* per cent., per annum, from the 1st of July, in the same year. In October, 1841, the money being still unpaid, T. P., by way of further security, gave a bill of sale, reciting the warrant of attorney, and that the sum of 1000*l.* was still due, and assigning certain property, and providing for the repayment of the 1000*l.*, and interest, at 5*l.* per cent. from the previous 30th of November, being the day up to which interest, under the warrant of attorney had been paid; the warrant of attorney bore an ad valorem stamp of 5*l.*; the bill of sale was impressed with a common 1*l.* 15*s.* stamp.

Held, that the ad valorem stamp on the warrant of attorney was sufficient, for that the definite and certain sum secured thereby, was 1000*l.* only, and that the interest formed no part of the definite amount secured: *Held*, also, that the warrant of attorney was an "instrument" within the meaning of the Stamp Act, (55 Geo. 3, c. 184, sched. part 1,) in furtherance of which the bill of sale was given, and that the warrant of attorney, bearing the proper ad valorem stamp, the latter was, therefore, brought within the exemption on mortgages provided for by that statute. *Pierpoint v. Gower*, 652

4. In support of a declaration assumpsit, for goods sold and delivered, the plaintiff sought to put in evidence an unstamped document in the following terms: "Send a license to use two of C. & C patent furnaces, to be applied to single plate and cloth boiler, which I agree to pay Mr. C., or order, as agreed 25*l.* as a part right, and which is to include iron works, fire bricks, and labor." *Held*, that this fell within the description contained in the schedule of the Stamp Act, 55 Geo. 3, c. 184, "Agreement, or minute, or memorandum of an agreement under hand," &c., and was liable to a stamp; and that it did not fall within the exemption of the statute, which applies to a "memorandum, letter or agreement, made for, or relating to the sale of any goods, wares, or merchandize;" for that, first, it was not a mere proposal for the sale of goods; and, secondly, that the subject-matter of the agreement was mere goods, wares, or merchandize, and that the defendant was there entitled to a nonsuit. *Chantrell v. Dickinson*,

STATUTE OF FRAUDS.

See PLEA, 2.

STAY OF PROCEEDINGS.

See JUDGMENT, 2.

Where, after judgment by default, a summons was taken out for a stay of proceedings in the action, on payment of debt and costs, on the 2nd of April, returnable on the 25th, before it was returnable, it was agreed between the parties, that hearing should be postponed until the afternoon of the 26th; and the morning of the 26th, the plaintiff executed a writ of inquiry for damages, of which notice had been

STAYING PROCEEDINGS.

previously given: *Held*, that such execution was bad, and must be set aside; for that the summons operated as a stay of proceedings from the time at which it was originally returnable on the 25th. *Sargent v. Brown*, 985

STAYING PROCEEDINGS.

See CORONERS' INQUISITION.
WRIT OF TRIAL, 4.

1. Where several successive ejectments have been brought to recover certain property, but none of them have been tried, the Court will not stay proceedings, in a subsequent ejectment, until the costs of the former ones have been paid. *Doe dem. Blackburn v. Standish*, 26

2. Where several actions of ejectment have been unsuccessfully brought, contesting the title to certain premises, if possession is obtained of those premises in a subsequent action of ejectment, founded on the same title, as upon a vacant possession, the Court will compel the lessor of the plaintiff to stay his proceedings until the costs of the former ejectments are paid. *Harvey dem. Beal v. Baker*, 75

3. The Court refused to stay the proceedings in an action of ejectment, brought, in respect of a forfeiture, upon the ground that another action of ejectment was pending in the Queen's Bench, between the same parties, to recover the same premises, upon a forfeiture, which it appeared, was antecedent to, and entirely distinct from that which formed the subject of the suit in this Court. *Doe dem. Henry v. Gustard*, 615

4. An affidavit in support of an application to stay proceedings on the ground that the action was brought for a sum under 40s., stated that the defendant was served with the writ in the county of M., where

SUMMONS.

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he and the plaintiff where then residing.

Held, insufficient, for not shewing that the defendant was resident there at the time of the commencement of the action. *Dowling v. Powell*, 1025

STEAM ENGINE.

See CORONERS' INQUISITION.

STET PROCESSUS.

See NOLLE PROSEQUI.

SUBPCENA.

1. A subpoena requiring a party to attend the trial of a cause on the commission day, extends to the whole Assizes. *Scholes and Another v. Hilton*, 229

2. In order to obtain an attachment for disobedience to a writ of subpoena, it must clearly appear that the absence of the witness was voluntary.

Semble, that it is no answer to shew that the testimony of the witness was immaterial. *Id.*

SUMMONS.

See DESCRIPTION (OF DEFENDANT).
NULLITY.

1. The date in a writ of summons was 1002, instead of 1842: *Held*, that a motion to set aside the writ or service was not irregular. *Wills v. Dawson*, 465

2. A writ of summons described the defendant as of W., in the county of York. The alias writ described him as of N., in the county of Southampton, and late of W., in the county of York. The Court refused to set aside the latter writ on affidavit, that the defendant never lived at York. *Windham v. Fenwick*, 783

3. Where, on the eighth day after the service of a copy of a writ of



TITLE.

officers of the parish should sign the undertaking to pay what should be found to be due to the attorney, but the undertaking was, in fact, signed by the persons who had been in office when the action was commenced, and upon taxation, more than one-sixth was taken off: the Court refused to set aside the taxation, upon the ground that the undertaking was not signed in accordance with the Judge's order. *Doe dem. Goodland and Others v. Franklin*, 975

TENDER.

See PLEA, 9.

SPECIAL COUNT, 2.

In debt, the plaintiff claimed 42*l.*; the defendant sought to shew that 31*l.* was all that was due, and the plaintiff was willing to accept 35*l.*, (at which sum the jury eventually assessed the damages.) In support of pleas of set-off and tender, the defendant showed payments, to the extent of 29*l.*, and called a witness to prove a tender; he stated that he had gone to the defendant, and had said, "I offer you 7*l.* 16*s.* 8*d.* as the balance of 35*l.*; and request a receipt in full:" *Held*, a conditional, and therefore, an insufficient tender. *Foord v. Noll*, 617

TERM (LAST DAY OF).

See PRECEDENCE OF MOTION.

TESTE.

See AMENDMENT, 1.

DISTRINGAS, 7.

THREAT.

See REPLEADER.

TIME (ALLEGATION OF).

See DEMURRER (FRIVOLOUS), 5.

TITLE.

See BANKRUPT, 2.

TRESPASS.

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TITLE (AVERRING).

See PLEA, 16.

DECLARATION, 4.

TOWN CLERK.

See CORPORATION.

TAXATION, 3.

TOWN COUNCIL.

See TAXATION, 3.

TRAVERSE.

See REPLICATION.

TRESPASS.

See BANKRUPT, 5.

PARTICULARS, 2.

1. Trespass lies against a corporation. *Maund v. The Monmouthshire and Staffordshire Canal Company*, 113

2. In trespass for breaking and entering the plaintiff's dwelling-house, the defendants F. and M., justified the trespasses, the former as owner in fee, the latter as his servant; plea also by the latter, not guilty: Replication, nolle prosequi as to F.; but alleging an estoppel as to M., for that before the trespasses, &c., the said M. demised the premises to the plaintiff as a yearly tenant at 16*l.* a-year, which demise was still in force, and undetermined: Rejoinder by M., denying that the said tenancy of the plaintiff was in full force and undetermined, &c: At the trial, the demise from M. to the plaintiff was proved, and it was shewn that a notice to quit, signed in the names of both defendants, was given to the plaintiff, and that subsequently a complaint was made to the magistrates under the 1 & 2 Vict. c. 74, s. 1, which was signed by the defendant F., "as for himself and M., either or both of them;" upon that complaint a warrant was issued, which

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contained the name of only one complainant, under which the trespass in question was committed, and the plaintiff ejected; the key of the house was taken to the defendant M., by the officer; the jury having found for the plaintiff.

Held, that that verdict was justified, and that there was no ground for a nonsuit: *Held* also, that *trespass* was the proper remedy, not *case*: *Held*, also, that the authority of the defendant M. as servant of F., was sufficiently denied by the replication of estoppel. *Darlington v. Pritchard and Another*, 664

TRIAL (NOTICE OF).

See WAIVER, 4.

TROVER.

See DUPLICITY, 1.
PLEA, 1.

TRUSTEES.

See CHARGING STOCK, 3.
INTERPLEADER, 6.
WARRANT (OF JUSTICES), 3.

TURNPIKE ACT.

See CONVICTION.

UNCERTAINTY.

See ARBITRATION, 5.

UNDER SHERIFF.

See WRIT OF TRIAL, 1.

UNWHOLESOME PROVISIONS (SELLING).

See PROVISIONS UNWHOLESOME
(SELLING).

USE AND OCCUPATION.

In an action for use and occupation, a defence that the premises were uninhabitable, by reason of a nuisance, may be given in evidence under the general issue. *Smith v. Marrable*, 810

VARIANCE.

USURY.

See WARRANT (OF ATTORNEY).

VACATION.

See JUDGE (ORDER OF).

VAGRANT.

The 5 Geo. 4, c. 83, which makes it an act of vagrancy in a parent to desert a child, applies to legitimate and not illegitimate children. *gina v. Maude*,

VARIANCE.

See ANNUITY DEED.

1. A declaration on a bill of exchange stated, that defendant, his agent, accepted the bill. defendant pleaded that he did not accept modo et forma. At the time the bill appeared to have been accepted by T., on behalf of the directors of a Mining Company, whom the defendant was one: no variance. *Firth v. Buckin*,

2. A plea of nul tiel record declaration, in scire facias, on a writ of mandamus, more than a year and a day old, puts in issue only the record of the judgment; therefore, where a motion for judgment on such a writ appeared, that the venue in the proceedings in scire facias was in error, but in the original action in Law it was held that the variance was immaterial. *Phillips v. Smith*,

3. Debt against husband and wife, on a judgment recovered against the wife, dum sola: Plea, nul tiel record. Upon production of the record appeared, that the judgment was recovered against the wife and not the husband. *Held*, no variance, but only good for plea in abatement. *Cocke v. Others v. Brewer and Elizabeth wife*,

4. Upon an issue of nul tiel record if the defendant takes an object

the record being produced, he is entitled to reply, *Id.*

VENDOR AND PURCHASER.

See DECLARATION, 4.

VENIRE FACIAS.

See AMENDMENT, 2.

VENUE.

See CAPIAS AD SATISFACIENDUM, 1.
VARIANCE, 2.

1. Where the cause of action arose in Surry, and the plaintiff laid his venue in London, the Court refused to change the venue, on the application of the *plaintiff*, upon a statement that the action was brought to try the right of a pound-keeper to take pound-fees upon certain cattle, and therefore a matter of rural experience; and that all the witnesses resided in the former county. *Fife v. Bousfield*, 705

2. Where the venue in an action was originally laid in Bristol, but upon the application of the defendant on the usual affidavit, it was changed to Berks, and the cause stood for trial at the assizes for that county, but owing to the pressure of business, it was made a remanet, and thereupon, on the application of the plaintiff, on a suggestion that a material witness on his behalf was in an infirm state of health, and not likely to live to the next assizes, the venue was again changed to Middlesex, the plaintiff being directed to pay all extra costs incurred by the defendant, in consequence of the change, and the plaintiff's witness died before any trial could be had, the Court, upon the motion of the defendant, directed the venue to be restored to Berks, but refused to do so, otherwise than upon the terms that the defendant should pay to the plaintiff, any costs occasioned by this removal. *Webb v. Bulkeley*, 900

VERIFICATION.

See COUNSEL, (SIGNATURE OF).
LIMITATIONS, (STATUTE OF), 3.

WAIVER.

See AMENDMENT, 1.
BANKRUPT, 2.
CONVICTION, 3.
NEW TRIAL, 2.
PARTICULARS, 1.
RAILWAY COMPANY, 3.

1. An application for time to reply, is a waiver of objection to a plea on the ground that it is not issuable. *Trott v. Smith, Executor*, 278

2. An objection to the jury summoned on a writ of trial, that they are not on the jury list for the county, is waived by the defendant acquiescing in the trial by that jury, though he was not, at the time, aware of the objection.

Quere, whether a defendant on a writ of trial, has a right of challenge. *Pryme v. Titchmarsh*, 474

3. To assumpsit by drawer against acceptor of two bills of exchange, for 20*l.* each, the defendant pleaded payment of 20*l.* into Court, and no damages *ultrà*. The plaintiff replied damages *ultrà*, upon which issue was joined. The defendant proposed to give in evidence, that the second bill had been given as a renewal of the first bill, which had been paid by a third party: *Held*, that the plea was clearly bad, but as the plaintiff had not demurred to it, the evidence was admissible upon the issue joined. *Harris v. Bushell*, 514

4. Where the plaintiff gave notice of trial for the sittings after Term in London, without specifying whether it was intended to try at the first, or at the adjourned sittings, according to the rule of Court, (H. T., 32 Geo. 3, C. P.,) and the defendant became aware of the intention to try at the latter, and took proceedings

writing to a bill of exchange, under Reg. Gen., 4 Wm. 4, r. 20, is not thereby precluded from objecting to the sufficiency of the stamp. *Fane v. Whittington*, 757

WARRANT (OF ATTORNEY).

See ATTESTING WITNESS.

BANKRUPT, 4.

COGNOVIT.

FRAUDULENT PREFERENCE.

INTERPLEADER, 10.

JUDGMENT, 3.

STAMP, 3.

1. The Court will not allow judgment to be signed on a warrant of attorney, against a defendant who is abroad, and has not been seen for three weeks, unless it is sworn that "it is believed he is still alive." *Richardson v. Scholefield*, 36

2. An attorney acting on behalf of the plaintiff cannot validly attest the execution of a warrant of attorney, under the 1 & 2 Vict. c. 110, s. 9, although named by the defendant himself, who knows him to be the plaintiff's attorney. *Cocks and Others v. Edwards*, 55

3. The application may be made at the instance of the defendant's assignees, and as the warrant is a nullity, delay is immaterial, in applying to set aside a judgment and execution signed and issued thereon.

and execution thereon; for the criterion by which the nature of the transaction is to be judged, is the security on which the money is originally lent; the bona fides between the parties. *Downes v. Garbutt*, 939

8. Where a tenant from year to year, had given a warrant of attorney, authorizing his landlord to determine the tenancy by a certain notice to quit, and upon neglect of such notice to sign judgment in ejectment, and issue execution thereon, the Court, upon affidavit of service of such notice and consequent determination of the tenancy, and of the fact that the tenant had refused to quit the premises, granted a rule for judgment upon the warrant of attorney. *Doe dem. Beaumont v. Beaumont*, 972

9. Where upon application for judgment upon an old warrant of attorney, it appeared, that in mistake, a copy instead of the original instrument had been filed, and the original could not be found, the Court, upon the affidavit by the attesting witness, who was since dead, of the due execution of the instrument, granted a rule. *Id.*

WARRANT (OF COMMISSIONERS).

The plaintiff was summoned by commissioners of bankrupt to appear before them, at eleven o'clock, on a certain day, and produce an indenture. He appeared at eleven, and afterwards at one, when the commissioners being engaged with another case, he left. He was subsequently apprehended by virtue of a warrant issued by the commissioners, which, after reciting the summons, directed the officer to bring the plaintiff "to be examined as aforesaid, and to produce the said assignment."

Held, first, that the warrant was regular, inasmuch as it was the duty

of the plaintiff to wait until the commissioners were ready to examine him.

Secondly, that the warrant was not vitiated by the introduction of the words, "to be examined, and to produce the said assignment." *Wright v. Maude and Others*, 517

WARRANT (OF JUSTICES).

1. It is no objection to a rule, for a mandamus to justices, to issue their warrant of distress for the levy of poor-rates, that it includes two separate and distinct rates. *Regina v. Ellis and Greenwood*, 361

2. Although there are more than two magistrates at petty sessions, all of whom take part in a decision, by which the issuing of a distress warrant to levy poor-rates is refused, it is not necessary that upon an application for a mandamus, all who were present and took part in the decision, should be included in the rule; but if the Court saw that any two had been selected, or that any of the justices so acting had been omitted for any improper purpose, all would be required to be joined. *Id.*

3. Where, upon an application for a mandamus to justices, to issue their warrant of distress to levy a poor-rate, it appeared that the property, in respect of which the rate was sought to be obtained, was trust property, left by a testator for the purposes of a free school, and that one of the justices refusing to grant his warrant was a trustee of the estate; it was held, that notwithstanding his character as such trustee, he was liable to the mandamus. *Id.*

4. A poor-rate was made on the 8th of May, 1841, for the township of K.; W., an occupier of land in the township, having refused to pay the rate made upon him, was summoned and appeared before the justices of K., on the 26th of August; the ap-

being equally divided in opinion gave no decision; a new demand was then made by the parish officers of the second rate, and on the 29th of December W. again appeared on a summons before the justices of K., in respect of that rate, but they again refused to issue their distress warrant: *Held*, that the parish officers were not too late in applying for a mandamus in respect of both rates in H. T., 1842: *Held*, also, that the magistrates of S., being equally divided in opinion upon the question of the liability of W. to the second rate, the parish officers were entitled to take the case before the magistrates of K., and that the latter had jurisdiction to act. *Ib.*

5. A testator by his will devised to the township of K. certain premises, for the maintenance of a sufficient schoolmaster for teaching children, residing within the town and parish of K., free and without any other stipend, and then said, "and it is further my desire that the town and parish of K., will exempt, free, and discharge my said messuages, &c., in K., as aforesaid, of and from the payment of all lays, taxes, impositions, and assessments:" *Held*, that although from the year 1713 to the year 1841, no assessment of poor-rate had been imposed in respect of the premises in question, that although in 1841

5. S. being in insolvent circumstances, assigned his property to the defendant for the benefit of the plaintiff, and other creditors. The property realized 2s. 6d. in the pound, which the defendant promised to pay the plaintiff: *Held*, that S. was a competent witness for the plaintiff in an action to recover the amount. *Hawley v. Cadbury*, 505

WRIT OF TRIAL.

See AMENDMENT, 1.
SHERIFF, 5.
WAIVER, 2.

1. A trial of a cause under the Writ of Trial Act, (3 & 4 Wm. 4, c. 24, s. 17,) before the deputy of the under-sheriff is void. *Jones v. Williams*, 938

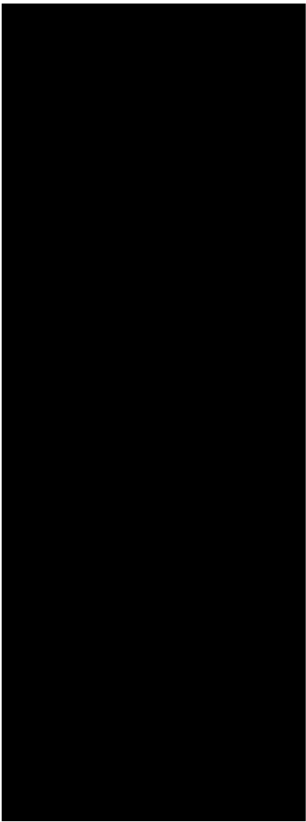
2. Where in an action for unliquidated damages, which is not triable before the sheriff, under the 3 & 4 Wm. 4, c. 42, s. 17, the plaintiff consents, upon a summons at Chambers, to take less than 20*l.*, in satisfaction of his debt, it should be made part of the Judge's order, upon his application, that the costs of the action should be taxed upon the higher scale; otherwise he will be entitled only to costs upon the

lower scale of taxation. *Horn v. Pockock and Another*, 948

3. Where an action of debt was tried before the sheriff and the jury returned a verdict for 20*l.* debt, and 1*s.* damages, it was held, that the jurisdiction of the sheriff, under the Writ of Trial Act, was not thereby vitiated or taken away. *Gutteridge v. Seth*, 954

4. Where upon the trial of an action of debt before an under-sheriff, the plaintiff recovered less than 40*s.* damages, the Court refused to stay all further proceedings in the suit after the verdict upon payment of the amount of the verdict without costs, upon a suggestion that the cause was triable in the county Court; and *semble*, that where in an action the plaintiff seeks to obtain an order for the trial of the cause before the under-sheriff, under the 3 & 4 Wm. 4, c. 42, s. 17, and the defendant anticipates that less than 40*s.* will be recovered, the defendant should seek to ingraft upon the order the term, that in such an event the plaintiff shall have no costs; for, after trial, the Court will not exercise its equitable jurisdiction to deprive the plaintiff of such costs, notwithstanding the statute 43 Eliz. c. 6, s. 2. *Salmon v. Tugman*, 977

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